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No. 04-864

IN THE

Supreme Court of the United States

HENRY LEE "LEROY" PICKETT, *et al.*,
Petitioners,

v.

TYSON FRESH MEATS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

First. Whether the rule of reason analysis, and its requirements of (1) a detailed analysis of any anticompetitive business practice within an industry and (2) weighing the anticompetitive practice against any procompetitive benefit derived from that practice, remains valid or, as the Eleventh Circuit—the lone outlier on this question—determined, the rule of reason may be replaced with an inverted quick look analysis that approves anticompetitive practices so long as *any* procompetitive benefit derives from an anticompetitive practice.

Second. Whether, as an issue of first impression that will resolve a deepening split among the circuits, a private plaintiff suing under section 202 of the Packers and Stockyards Act, 7 U.S.C. § 192, must show that a challenged practice has an adverse effect on competition or—consistent with the language of the statute—only that the practice was unfair, intended to manipulate or control prices, or has the effect of manipulating or controlling prices.

CORPORATE DISCLOSURE STATEMENT

The Petitioners appealing from the ruling of the United States Court of Appeals for the Eleventh Circuit are Henry Lee Pickett, Mike Callicrate, Pat Goggins, Johnny Smith, Christopher J. Abbott, and W. J. Rothwell Ranch Company and the certified class that they represent. No publicly held corporation has an interest requiring disclosure under Supreme Court Rule 29.6.

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Turner, The Durability Relevance, and Future of American Antitrust Policy, 75 Cal. L. Rev. 797 (1987)	9
USDA Economic Research Service, State Fact Sheets, available at http://www.ers.usda.gov/StateFacts/	24
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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Eleventh Circuit (Pet. App. 1a) was reported at 420 F.3d 1272 (11th Cir. 2005). The opinion of the district court (Pet. App. 28a) was reported at 315 F. Supp. 2d 1172 (M.D. Ala. 2004).

JURISDICTION

The court of appeals issued its opinion on August 16, 2005. Pet. App. 1a. It denied Pickett's timely petition for rehearing *en banc* on October 7, 2005. This Court has jurisdiction under 28 U.S.C. section 1254(1).

STATUTORY PROVISION INVOLVED

Section 202 of the Packers and Stockyards Act (PSA) relates to the second question presented and states:

> It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or
>
> (c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or
>
> (d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or
>
> (e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or
>
> (f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on

business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.

7 U.S.C. § 192.

STATEMENT OF THE CASE

Petitioners Henry Lee "Leroy" Pickett *et al.* are named plaintiffs in a nationwide class of cattle ranchers who sell fed cattle to the Respondent, Tyson Fresh Meats, Inc. Tyson, formerly known as Iowa Beef Processors, Inc. (IBP), is the nation's largest meat packer. Pickett seeks certiorari because the Eleventh Circuit erroneously affirmed a post-verdict judgment as a matter of law, despite specific jury findings that Tyson engaged in its anticompetitive practices to depress cattle prices, and had no valid business justification for its conduct.

The Eleventh Circuit committed at least two cert-worthy errors when it affirmed the reversal of that verdict: First, it deepened a circuit split where the Eleventh Circuit—the lone outlier among the circuits—misapplies the rule of reason analysis that antitrust law requires. Second, it deepened a circuit split regarding what private party's burden of proof under PSA section 202, 7 U.S.C. § 192.

A. Factual Background

The essential theory on which Pickett's case rests is this: Tyson manipulates the price for fed cattle via captive supply to reduce the price it pays for fed cattle on the cash market. Tyson depresses the price for fed cattle and buys more cattle for less money, because its withdrawal from the cash market reduces market demand. How Tyson manipulates the market is more easily understood within the context of the industry,

so we begin with a short introduction to the cattle market. We then discuss the specific facts of this appeal.

The relevant market in which Pickett and Tyson operate is the market for fed cattle—cattle raised for the express purpose of sale to meat packers. Fed cattle are sold to the packers, who then sell the processed beef to grocers, retailers, and restaurateurs.

Generally, calves are fed by their mothers for 200 days at the farm where they were born, and they are kept and fed at those farms for another 2 .0 days after they are weaned. At 400 days old, the cattle are shipped to feed lots where they are put on an intense weight-gaining program for about 120 days. By day 120 in feed lot, fed cattle should have achieved a target weight of around 1250 pounds.

When fed cattle reach the target weight, ranchers and feed lot operators have a short, two-week window in which they can sell their stock of fed cattle to packers. Fed cattle, in that way, are like bananas: the critical window of ripeness in which the ranchers and feed lot operators must sell fed cattle determines the value of the cattle sold, because the cost of feeding cattle beyond their target weight is high, those animals are less likely to put on beneficial weight, and packers impose penalties for processing cattle that are either too heavy or too large.

There are two methods by which packers procure fed cattle from ranchers. The first is the cash market, which was the primary method of purchasing cattle between the 1940s and the 1990s. Buyers representing Tyson and other packers go to feed lots and inspect cattle. If the buyers like the cattle in a particular pen, they make an offer to buy the cattle; if they do not want to buy the cattle, no offer is made. Ranchers are then free to accept or reject the offer of the packer's representative, or they may bargain with the buyer for a better offer. Cattle are shipped to the packer between seven and ten days after the two sides have agreed on a price.

Packers also buy cattle through captive supply arrangements. *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1278 (11th Cir. 2000) (according to the USDA, "cattle that are controlled by or committed to a packer more than two weeks" before the cattle are processed by the packer are designated as "captive supply"). The most relevant captive supply agreement in this appeal is called a marketing agreement. Under this regime, feed lot operators call the buyers that represent packers and tell the buyers that there are cattle ready for sale. The packers set the date on which the cattle will be delivered from the feed lot and, upon delivery, the packers modify the amount paid to the ranchers from a contract price. Ranchers cannot bargain with packers under marketing agreements. This practice is a sharp contrast from the cash market.

Both methods of selling fed cattle intersect because of the pricing formula packers use: Cattle sold via marketing agreements are priced according to the average paid for cattle on the cash market when the animals are processed. If the cash market average is artificially low, therefore, the price paid to the ranchers under a marketing agreement will also be lower, regardless of the yield of the cattle.

Pickett and the plaintiff class members sell cattle to Tyson on the cash market. Tyson's use of captive supply has withdrawn many sellers from the cash market and has reduced the cash market—the only segment of the fed cattle market that allows for bargained prices—to a small percentage of the whole market. Tyson has reduced the demand for fed cattle from the cash market because of its purchase of cattle via marketing agreements.

Tyson's anticompetitive behavior impacts both methods of cattle procurement. The free tide of the cash market sinks because Tyson has reduced demand in that market. The vessel of captive supply cattle also sinks, because the falling tide in the cash market sets the price at which cattle are sold under marketing agreements. That anticompetitive manip-

ulation of cattle prices, therefore, is doubly beneficial for Tyson's bottom line. The jury realized this when it determined that Tyson used captive supply to manipulate the price it paid for cattle.

B. Procedural History

In July 1996, Pickett sued Tyson in the Middle District of Alabama for violations of the Packers and Stockyards Act, based on the anticompetitive manipulation of cattle prices by Tyson. After several interlocutory appeals to the Eleventh Circuit, Pickett was certified as the class representative of persons who sold fed cattle to Tyson on the cash market. Pet App. at 5a & n.2.

The parties tried the case to a jury for four weeks. Ultimately, the jury rendered every portion of a special verdict on liability issues in favor of Pickett. The jury found that (1) there is a nationwide market for fed cattle, (2) the use of captive supply by Tyson had an anticompetitive effect on prices paid in the cash market, (3) Tyson had no legitimate business reason or competitive justification for using captive supply, (4) Tyson's use of captive supply caused the cash market price to fall to an artificially low level, and (5) Tyson's use of captive supply caused an injury to the class members. Pet. App. at 53a-54a. The jury determined that Tyson's anticompetitive conduct had reduced the price paid for cattle on the cash market by $1,281,690,000. Pet. App. at 54a.

After the jury returned its fair verdict, the district judge granted judgment as a matter of law in favor of Tyson, under Federal Rule of Civil Procedure 50(b). A panel of the Eleventh Circuit affirmed the decision of the district judge on August 16, 2005. The Eleventh Circuit denied Pickett's timely motion for rehearing *en banc* on October 7, 2005.

REASONS TO GRANT THE PETITION

I. The Eleventh Circuit Has Abandoned the Rule of Reason Analysis, A Staple of Antitrust Law, and is the Lone Outlier in an Untenable Split Among the Circuits.

Although there is an element of fluidity in antitrust law, anticompetitive practices are evaluated generally under one of three types of tests. First, certain restrictions "are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *N. Pac. R. Co. v. United States*, 356 U.S. 1, 5, 78 S. Ct. 514, 518 (1958). "Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50, 97 S. Ct. 2549, 2557 (1977); *see also, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218, 60 S. Ct. 811, 841 (1940) (horizontal price fixing); *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 405, 31 S. Ct. 376, 383 (1911) (vertical price fixing); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609, 92 S. Ct. 1126, 1134 (1972) (horizontal market division); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9, 104 S. Ct. 1551, 1556 (1984) (certain tying arrangements); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211-12, 79 S. Ct. 705, 708-09 (1959) (certain horizontal refusals to deal). The per se test invalidates a challenged practice without question, because experience has proven that practice inherently unreasonable. *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344, 102 S. Ct. 2466, 2473 (1982).

Second, the "quick look" test gives the challenged practice only a slightly better chance of approval than a per se analysis. In "quick look" cases, "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive

effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770, 119 S. Ct. 1604, 1612 (1999); *see also, e.g.*, *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459, 106 S. Ct. 2009, 2018 (1986); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 S. Ct. 2948 (1984); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692, 98 S. Ct. 1355, 1365-66 (1978).

The third test is the rule of reason analysis. The rule of reason is the classic test by which anticompetitive conduct, like the price manipulation Tyson committed, is evaluated: "[M]ost antitrust claims are analyzed under a rule of reason, according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint . . . ." *State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S. Ct. 275, 279 (1997). The rule of reason has "origins in common-law precedents long antedating" antitrust statutes and it is used to evaluate claims under all of the antitrust laws Congress has promulgated. *See Prof'l Eng'rs*, 435 U.S. at 688, 98 S. Ct. at 1363. Although this petition arises under the PSA, therefore, this issue impacts all of the antitrust statutes.

This is the classic summary of the rule of reason:

> [T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 244 (1918).

Two characteristics are essential to the modern rule of reason analysis: (1) the in-depth factual inquiry into the challenged practice, as exemplified in *Chicago Board of Trade*, and (2) the rule of reason "requires an exhaustive inquiry into all the myriad factors 'bearing on whether the conduct is on balance anticompetitive or procompetitive.'" *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 34 (D.C. Cir. 2005) (quoting Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 Cal. L. Rev. 797, 800 (1987)). *See also Continental T.V.*, 433 U.S. at 49-50, 97 S. Ct. at 2557 (under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited"). The critical question, therefore, is this: Are the anticompetitive harms caused by the anticompetitive practice greater than the procompetitive benefits derived from the anticompetitive practice? *See* Areeda & Hovenkamp, *Fundamentals of Antitrust Law* §§ 15.02-.04 (3d ed. Supp. 2005); Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. Rev. 1265, 1267 ("Any antitrust practitioner can explain that whichever side of the scale weighs heavier determines the outcome: if the court finds that the anticompetitive effects predominate, it invalidates the agreement; if the procompetitive effects win out, it upholds the agreement.")

Every other circuit readily accepts that an analysis under the rule of reason requires the court to balance the procompetitive benefits of a challenged practice against the anticompetitive harm caused by the practice. *See, e.g., E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc.*, 357 F.3d 1, 5 (1st Cir. 2004); *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997); *United States v. Brown Univ.*, 5 F.3d 658, 678-79 (3d Cir. 1993); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 207 n.16 (4th Cir. 2002); *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 765 (5th Cir. 2002); *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469 (6th Cir. 2005);

Generac Corp. v. Caterpillar, Inc., 172 F.3d 971, 977 (7th Cir. 1999); *Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n*, 666 F.2d 1130, 1138 (8th Cir. 1981); *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1156 (9th Cir. 2003); *Diaz v. Farley*, 215 F.3d 1175, 1182 (10th Cir. 2000); *Polygram Holding*, 416 F.3d at 34 (D.C. Cir.). The Eleventh Circuit, however, no longer applies that essential weighing in the antitrust context.

Although the merits of the erroneous decision of the Eleventh Circuit are addressed more fully in Part III, a brief examination of the reasoning of the Eleventh Circuit is necessary to appreciate fully how wrong that court is. Writing for the panel, Judge Carnes stated specifically that (1) Pickett must show that "marketing agreements have no pro-competitive justifications," Pet. App. at 11a; (2) Pickett could not prevail unless "there is evidence from which a jury reasonably could find that none of Tyson's asserted justifications are real, that each one is pretextual," *id.* at 14a; and (3) Pickett "did not present any evidence from which a reasonable jury could conclude that Tyson lacked pro-competitive justifications for using the agreements," *id.* at 25a.[1] The Eleventh Circuit misapplied totally the rule of reason analysis.

Rather than examining the evidence Pickett put forth showing that anticompetitive harms outweighed substantially the procompetitive benefits Tyson derived from its use of marketing agreements, the Eleventh Circuit flipped the ordinary antitrust analysis on its head. The court of appeals decided that, unless Pickett could disprove the existence of *any* procompetitive benefit that Tyson derived from its

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[1] Even under that erroneous formulation of the rule of reason, Pickett still won. The jury, which had heard four weeks of evidence at trial, found that Tyson could not show adequately that it had any business justification for captive supply that was more than mere pretext.

manipulation of cattle prices in the cash market, Pickett's claims would fail.

The Eleventh Circuit's incorrect formulation of the rule of reason dates back nearly a decade to another opinion of Judge Carnes. *Levine v. Cent. Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996) (the rule of reason "requires the plaintiff to prove (1) an anticompetitive effect of the defendant's conduct on the relevant market, and (2) that the conduct has no procompetitive benefit or justification"). The Eleventh Circuit has used that test, which omits wholly the essential weighing requirement of the rule of reason analysis, consistently across multiple statutory regimes. *See, e.g.*, *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Communications, Inc.*, 376 F.3d 1065, 1071 (11th Cir. 2004); *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1213 (11th Cir. 2002); *S. Card & Novelty, Inc. v. Lawson Mardon Label, Inc.*, 138 F.3d 869, 876 (11th Cir. 1998); *Retina Assocs., P.A. v. S. Baptist Hosp. of Fla.*, 105 F.3d 1376, 1383 (11th Cir. 1997). Unburdened by the correct test this Court has set forth, the Eleventh Circuit has, instead, opted to create *ex nihilo* a new category of antitrust test: the inverted quick look, where every anticompetitive practice will stand unless the plaintiff can disprove that it has any redeeming virtue whatsoever. Under this inverted quick look test, if a practice is 99% harmful and 1% beneficial, it may survive simply because the plaintiffs cannot rebut the 1% procompetitive benefit.

The Eleventh Circuit has abandoned any proper application of the rule of reason for nearly a decade, and this Court must grant certiorari to bring the Eleventh Circuit back among the fold of its sister circuits who apply this Court's formulation of the rule of reason.

II. Recent Decisions in the Eleventh Circuit Have Deepened a Longstanding Split Among the Circuits Regarding Private Rights of Action under the PSA, a Vital Federal Statute.

The second cert-worthy error the Eleventh Circuit committed is that its decision deepened a longstanding split among the circuits regarding how the PSA should be interpreted. Specifically, should the plain language of the statute control, or should courts engraft a requirement of competitive harm—one that Congress chose not to include—into section 202 of the PSA?

In 1976, the Seventh Circuit concluded that 202(a) of the Packers and Stockyards Act did not provide a private right of action. *See Pac. Trading Co. v. Wilson & Co., Inc.*, 547 F.2d 367 (7th Cir. 1976). Even though there was doubt that the PSA precluded private causes of action, later that year Congress nevertheless expressly added a private right of action to the PSA. 7 U.S.C. § 209(b). This Court has not decided a case under section 202 of the PSA since that statute was amended almost thirty years ago to add formally the right of a private citizen to sue under the PSA. Indeed, research shows that the Court has not considered *any* case under the PSA since the October Term of 1973. *Mahon v. Stowers*, 416 U.S. 100, 94 S. Ct. 1626 (1974). This petition presents the Court an excellent opportunity to resolve pressing issues presented by the PSA.

Historically, the courts of appeals interpreted the PSA as not requiring a showing of anticompetitive harm. *See, e.g., United States v. Donahue Bros.*, 59 F.2d 1019 (8th Cir. 1932). The Seventh Circuit was the first to depart from that view and require a showing of anticompetitive harm in PSA cases. *Armour & Co. v. United States*, 402 F.2d 712, 718 (7th Cir. 1968). Even *Armour & Co.*, however, ran counter to that court's own established interpretation of the PSA in *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961).

The Ninth and Tenth Circuits, however, have rejected the view of the Seventh Circuit as contrary to the PSA. *Spencer Livestock Comm'n Co. v. Dep't of Agric.*, 841 F.2d 1451, 1455 (9th Cir. 1988); *Hays Livestock Comm'n Co., Inc. v. Maly Livestock Comm'n Co., Inc.*, 498 F.2d 925, 932 (10th Cir. 1985). In *Spencer*, the Ninth Circuit determined that a showing of fraudulent business practices alone was sufficient to establish a PSA violation, and the court of appeals based its decision on the interpretation that the United States Department of Agriculture historically had given to the PSA. 841 F.2d at 1454. The Ninth Circuit has determined consistently that fraudulent or deceptive business practices violate the PSA, regardless of whether the plaintiff has shown anticompetitive harm. *Blackfoot Livestock Comm'n Co. v. Dep't of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Sebastopol Meat Co. v. Sec'y of Agric.*, 440 F.2d 983, 983 (9th Cir. 1971). The Tenth Circuit has been similarly consistent in its interpretation of the PSA. *Peterman v. USDA*, 770 F.2d 888, 890 (10th Cir. 1985); *Hays*, 498 F.2d at 932.

The Eleventh Circuit has claimed that other courts lean toward its view, *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1302-05 (11th Cir. 2005), but that is a dubious statement. Contrary to the statement of the Eleventh Circuit, the Fourth and Eighth Circuits have not addressed specifically the second question this petition presents. *Compare Farrow v. USDA*, 760 F.2d 211, 241 (8th Cir. 1985), *with Van Wyck v. Bergland*, 570 F.2d 701 (8th Cir. 1978). *See also Philson v. Goldsboro Milling Co.*, Nos. 96-2542 & 96-2631, 1998 WL 709324, *unpub'd decision in table at* 164 F.3d 625 (4th Cir. Oct. 5, 1998). At a minimum, however, the positions of the Seventh and Eleventh Circuits are in direct conflict with those of the Ninth and Tenth Circuits, the plain language of section 202, and the position of the USDA.

This circuit split shows an ebb and flow regarding how the PSA should be interpreted. After the Seventh Circuit, in

1968, departed from the long-held view that no competitive harm must be shown, twenty years passed before the Ninth Circuit tried to restore the historical balance of PSA cases. The recent trend of Eleventh Circuit caselaw erroneously requiring either showings of competitive harm or a demonstration that every proffered procompetitive justification is pretextual has exacerbated this circuit split.

Although this case presents a question under only section 202 of the PSA and many provisions of that statute have produced this split, a broad-based doctrinal question can be resolved by the narrow issues this petition presents. Because the Court has not interpreted any private-right-of-action cases under the PSA, and has not decided a PSA case in almost three decades, the circuits will continue to articulate divergent views regarding how the PSA should be interpreted. A grant of certiorari is the only way that federal law can be reconciled. The Court, therefore, should grant certiorari review.

III. The Eleventh Circuit is Absolutely Wrong on the Merits, and Must Be Reversed.

As explained in Parts I and II, the Eleventh Circuit committed two serious errors worthy of certiorari review when it deepened existing splits among the courts of appeals. A third reason that this Court should grant certiorari is that the Eleventh Circuit is absolutely wrong on the merits of this case, and must be reversed. First, the Eleventh Circuit erred when it incorrectly decided important issues of law under the PSA. The plain text of the PSA and its legislative history confirm the error of the Eleventh Circuit. Second, even if the Eleventh Circuit did not err in its interpretation of the PSA, that court failed to apply correctly the rule of reason, an essential doctrine of antitrust law, and its error must be reversed.

A. The Eleventh Circuit's Interpretation of the PSA Must Be Reversed.

There are two reasons why the Eleventh Circuit was wrong in its interpretation of the PSA. Those errors warrant review.

1. *The Plain Language of the PSA Does Not Require a Showing of Competitive Harm.*

Pickett sued Tyson under sections 202(a) and (e) of the PSA. Those statutory provisions provide as follows:

> It shall be unlawful for any packer . . . to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> . . .
>
> (e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices . . . .

7 U.S.C. § 192(a), (e).

Under section 202(a), there was no need for Pickett to prove any anticompetitive harm. *Wilson & Co.*, 286 F.2d at 895 (section 202(a) "does not specify that a 'competitive injury' or a 'lessening of competition' or a 'tendency to monopoly' be proved to show a violation of the statutory language"). The logic and form of section 202 dictate that Congress sought to prevent a broad class of harms with subsection (a), and reading a competitive injury requirement would eviscerate the plain meaning of that provision:

> [T]he structure of the statute suggests that "unfair" or "deceptive" practices are prohibited separately and apart from anticompetitive or "monopolistic" practices . . . . Thus, . . . only a strained reading of the statute could require that practices that are "unfair" or "deceptive" within the meaning of § [202(a)] must also be "monopolistic" or "anticompetitive" to be prohibited.

Kinkaid v. John Morrell & Co., 321 F. Supp. 2d 1090, 1103 (N.D. Iowa 2004); *Excel Corp. v. USDA*, 397 F.3d 1285,

1294 (10th Cir. 2005) ("Nothing in the language of § [202(a)] . . . requires a showing of wrongful intent. To the contrary, the focus is solely on the acts committed or omitted.").

The plain language of section 202(e) also omits any requirement that Pickett show anticompetitive harm. Justice Scalia has used section 202 of the PSA as an analogue for the language in section 5 of the Voting Rights Act. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 331-32, 120 S. Ct. 866, 873 (2000). In *Bossier Parish*, the Court determined that allowing different modifiers for the purpose prong and the effect prong in section 5 cases would not meet the terms of the statute or common sense. *See id.*; 120 S. Ct. at 873. The implication of the "purpose or effect" language in section 202(e) of the PSA, therefore, is clear: Pickett only needed to show, to the satisfaction of the jury, some combination of the following to prevail on his section 202(e) claim:

- (1a) Tyson engaged in "*any* course of business" *or* (1b) Tyson did "*any* act;"
- (2a) "for the purpose" of *or* (2b) "with the effect of;"
- (3a) manipulating prices in the cash market for fed cattle *or* (3b) controlling prices in the cash market for fed cattle.

See 7 U.S.C. § 192(e).

The evidence Pickett presented was more than competent for that purpose. Pickett showed that Tyson actively used captive supply to purchase cattle. Pickett also showed that Tyson's use of captive supply had the effect of manipulating prices in the cash market by artificially depressing the prices Tyson paid for cattle. Pickett submitted at least three types of evidence on this point. First, lay and expert witnesses—including Pickett's industry experts—testified that Tyson's anticompetitive conduct depressed cattle prices in the cash market. Second, Pickett's expert economist presented multiple economic models that showed the relationship between

Tyson's use of captive supply and depressed cash market prices. That expert also described how the price paid for captive supply cattle is determined from the cash market and the high levels of cattle purchased via captive supply mean that the marginal cost effect of each cash market transaction is ratcheted up, causing Tyson to pay a lower price in cash market transactions. Third, Tyson's own expert testified that the models Pickett's expert created accurately showed a correlation between Tyson's use of captive supply and depressed prices in the cash market. The jury confirmed through its verdict that Pickett met every element required by the plain language of the statute.

If Congress had wanted to require a showing of anti-competitive harm in section 202 cases, Congress would have drafted the statute differently. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Congress knew well how to require such a showing, and chose not to insert such a requirement into section 202 of the PSA. *See, e.g.*, Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15) ("Any person who shall be injured in his business or property").

2. *The Legislative History of the PSA Confirms that No Showing of Competitive Harm is Required.*

Even though the plain language of section 202 is clear, this Court will find the plain language interpretation Pickett suggests is bolstered by the legislative history of the PSA, which confirms that no showing of anticompetitive harm is required.

In the PSA, Congress intended to exercise "the fullest control of packers and stockyards" permitted by the Constitution. H.R. Conf. Rep. No. 67-324, at 3 (1921). The

House Report stated that the antitrust laws passed before the PSA were narrower than the PSA would be:

> A careful study of the bill, will . . . convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that it is a most comprehensive measure and *extends farther than any previous law in the regulation of private business*, in time of peace, except possibly the interstate commerce act.

H.R. Rep. No. 67-77, at 2 (1921) (emphasis added).

The Seventh Circuit previously has shown an understanding that Congress intended the PSA to be more wide-ranging than any previous industry regulation:

> The legislative history shows Congress understood the sections of the Packers and Stockyards Act under consideration were broader in scope than the antecedent legislation. To illustrate, Representative (later Speaker) Rayburn, emphasized that although Congress gave the Federal Trade Commission wide powers to prohibit unfair methods of competition, such authority is not as wide-ranging as that given to the Secretary of Agriculture under [section 202].

Wilson & Co., 286 F.2d at 895. The legislative history also shows that Congress contemplated exactly the situation Pickett presents—one where buyers, like Tyson, would depress prices to any point possible that would not result in the end of their supply of cattle. Meat Packer Legislation hearings before the House Committee on Agriculture, 66th Cong., 2d Sess., p. 250 (1920) (specifically discussing potential for market manipulation).

That understanding of the comprehensive nature of the PSA and its history led the Ninth Circuit to uphold an enforcement action by the USDA in *Spencer Livestock*:

> The primary purpose of the [PSA] was to assure fair competition and fair trade practices in livestock mar-

> keting. It was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics. Thus, . . . we uphold a finding of a § 213 violation where the evidence establishes a deceptive practice, whether or not it harmed consumers or competitors.

841 F.2d at 1455 (internal citations and quotation marks omitted). The decision of the Eleventh Circuit is wholly inconsistent with the broad regulatory scheme of the PSA.

B. The Failure of the Eleventh Circuit to Apply Properly the Rule of Reason Warrants Review.

Pickett maintains that no showing of competitive harm is required under the PSA, but certiorari could be granted on an alternate theory. Even if a claim under PSA section 202 requires a showing of anticompetitive harm, the rule of reason analysis still provides Pickett an opportunity to prove that the anticompetitive harms of captive supply outweigh its procompetitive benefits. As shown in Part I, the Eleventh Circuit is the lone outlier among the circuits not to recognize that the rule of reason requires that analysis.

By way of example, *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), stands in sharp contrast to the erroneous decision of the Eleventh Circuit. In *Visa*, the government sued MasterCard and Visa, and contended that the companies prevented banks from entering into agreements with other credit card companies because of the way in which they structured their relationships with the banks. The government alleged that MasterCard and Visa prevented banks with whom they worked from working with American Express and Discover. That case shows how the rule of reason analysis should be conducted, because the court weighed the procompetitive benefits and anticompetitive harms of the challenged practice. *Id.* at 240-43.

Judge Leval wrote for the Second Circuit that "[t]he principal question in a rule of reason case is often whether the

anticompetitive effects of a restraint are outweighed by some procompetitive justification." 344 F.3d at 238; *see also Hertz Corp. v. New York*, 1 F.3d 121, 130 (2d Cir. 1993). In balancing procompetitive benefits with anticompetitive harms, the *Visa* court required three burden-shifting steps. The Second Circuit required (1) the plaintiff to show that "the defendants' actions have had substantial adverse effects on competition, such as increases in price, or decreases in output or quality;" (2) once the plaintiff met that burden, that the defendants had to "provide a procompetitive justification for the challenged restraint;" and (3) if the defendants succeed at that, the plaintiff had to prove "that the challenged restraint is not reasonably necessary to achieve the defendants' procompetitive justifications, or that those objectives may be achieved in a manner less restrictive of free competition." *Visa*, 344 F.3d at 238 (citations omitted). When that burden-shifting framework was complete, the court weighed the harms caused by the challenged practice against its benefits.

When compared to the reasoning in *Visa*, the position of the Eleventh Circuit in *Pickett* confirms that circuit's status as the lone outlier not to recognize the essential inquiry of the rule of reason analysis. The analysis of the Eleventh Circuit began by listing the alleged procompetitive effects of captive supply Tyson asserted. Pet. App. at 13a. To its credit, the Eleventh Circuit analyzed in great detail each procompetitive justification Tyson offered. Pet. App. at 15a-25a. Pickett's asserted anticompetitive harms, however, received no more than a passing mention. Pet. App. at 13a, 18a-21a. There is no way that the Eleventh Circuit could determine whether the challenged use of captive supply by Tyson was "one that promotes competition or one that suppresses competition" without identifying clearly and analyzing Pickett's proffered anticompetitive harms. *Prof'l Eng'rs*, 435 U.S. at 691, 98 S. Ct. at 1365. The Eleventh Circuit was concerned only with requiring Pickett to disprove the rationales Tyson offered. Even under that erroneous test, Pickett still prevailed at trial,

because the jurors determined that each of Tyson's stated procompetitive justifications was pretextual.

The Second Circuit, by contrast, examined the rationales put forth by each party and performed the critical balancing test that the rule of reason requires. *Visa*, 344 F.3d at 241-43. The *Visa* court determined, "In sum, the defendants have failed to show that the anticompetitive effects of their exclusionary rules are outweighed by procompetitive benefits." *Id.* at 243.

The Eleventh Circuit's truncated analysis, however, stated only that Pickett did not show that "marketing agreements have no pro-competitive justifications," "that none of Tyson's asserted justifications are real, that each one is pretextual," or "present any evidence from which a reasonable jury could conclude that Tyson lacked pro-competitive justifications for using the agreements." Pet. App. at 11a, 14a, 25a. Nowhere in the antitrust jurisprudence of this Court does such a requirement appear. *See, e.g.*, *Prof'l Eng'rs*, 435 U.S. at 691, 98 S. Ct. at 1365. The grave error of the Eleventh Circuit runs counter to the law of this Court and the position of each of its sister circuits.

The Eleventh Circuit has created a backward rule of reason analysis that is more like an entirely new test—the inverted quick-look. Even if the PSA requires a showing of competitive harm, this Court must grant certiorari to reverse the upside-down antitrust analysis of the Eleventh Circuit, and offer plaintiffs at least an opportunity to show that, on balance, anticompetitive harms can result from conduct that may have some procompetitive benefit.

IV. This Petition is a Better Vehicle for The Court to Reach Either Question Presented than Other PSA Cases from the Eleventh Circuit

This Court has recently denied certiorari in two other PSA section 202 cases from the Eleventh Circuit. *London v.*

Fieldale Farms Corp., 410 F.3d 1295 (11th Cir.), *cert. denied* 126 S. Ct. 752 (2005); *Glass v. Cagle's, Inc.*, No. 04-15431, 143 Fed. Appx. 300 (11th Cir.), *cert. denied* 126 S. Ct. 801 (2005). This petition, however, presents a much better vehicle for this Court to decide either the PSA question or, more importantly, the antitrust question presented.

Pickett presented evidence in the district court that built an excellent record showing the harm caused by Tyson's anticompetitive use of captive supply. Multiple lay and expert witnesses testified that Tyson's anticompetitive conduct depressed cattle prices in the cash market. Pickett's expert economist presented multiple economic models that showed the relationship between Tyson's use of captive supply and depressed prices in the cash market. Tyson's own expert witnesses agreed that the models Pickett's expert created accurately showed a correlation between Tyson's use of captive supply and depressed prices in the cash market.

Even though the Eleventh Circuit does not employ the rule of reason analysis this Court has established, the evidence at trial was sufficient for Pickett to win even on the Eleventh Circuit's unfair playing field. When Tyson asserted that it needed the steady stream of cattle provided by captive supply, Pickett convinced the jury that a sufficient inventory of cattle was available to Tyson on the cash market. When Tyson argued that it wanted to incentivize production of cattle that best met Tyson's needs, Pickett showed that Tyson provides the same types of incentives on the cash market. When Tyson contended that captive supply sheltered the company from excess risk, Pickett explained to the jury that Tyson was still free to hedge its risk on the Chicago Mercantile Exchange. The jury was presented damning evidence that Tyson would, at regular intervals, purchase more cattle for a facility than it could process and ship those cattle to other facilities. Pickett showed the jury that those selective runs on fed cattle artificially depressed the market price, and the jury

determined that Tyson used those runs on fed cattle as a price control device.

Based on the evidence Pickett presented at trial, the jury determined that the procompetitive benefits of captive supply were mere pretext. The jury was instructed fully regarding how to balance the alleged procompetitive benefits Tyson attributed to its use of captive supply against the harm it caused to the cash market:

> If the beneficial effects on competition outweigh the harmful effects on competition, or if the net effect on competition is only slight or insubstantial, you may find that [Tyson's] conduct has competitive benefits. If you believe that [Tyson] has legitimate business justifications for using captive supply, you may indicate as such on the verdict form.

Pet. App. at 48a; *see also* Pet. App. at 45a, 47a. The trial judge even issued an instruction to the jury that clarified that a "legitimate" business justification was "a valid business justification or reason in contrast to a pretextual justification or reason." Pet. App. at 52a. Tyson did not object to that clarifying instruction.

The jury returned a special verdict form and ruled in Pickett's favor on all liability questions. The jury found that (1) there is a nationwide market for fed cattle, (2) Tyson's use of captive supply had an anticompetitive effect on cash market prices, (3) Tyson had no legitimate business reason for using captive supply, (4) Tyson's use of captive supply caused the cash market price to fall to an artificially low level, and (5) Tyson's use of captive supply caused an injury to the class. Pet. App. at 53a-54a.

Neither *London* nor *Glass* presented such a well-developed record for deciding the issues this petition presents. Even in *London*, which had the better developed record on appeal, the jury was not offered the chance to make its rulings under the

special verdict form used here. *London*, 410 F.3d at 1300. The jury also was not presented a broad, market-based claim like the issues here. Neither case gave the trial court an opportunity to know specifically what the jurors thought about each element of the case, and neither presented a broad, doctrinal antitrust question. Here, the special verdict on liability may prove determinative of the rule of reason question presented.

The verdict of the jury in this case was essential, because "[t]he state of a man's mind is as much a fact as the state of his digestion"; "[i]t is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much as fact as anything else." *Eddington v. Fitzmaurice*, 29 Ch. Div. 459, 483 (1885). The jury determined that Pickett presented compelling evidence that Tyson had no valid business justification for its use of captive supply, or that all of Tyson's proffered reasons were mere pretext. This Court regularly defers to the reasoned judgment of jurors when deciding similar questions of ultimate fact in other types of cases. *See, e.g.*, *United States Postal Serv. v. Aikens*, 460 U.S. 711, 715-16, 103 S. Ct. 1478, 1482 (1983) (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095 (1981)). The antitrust context should be no different.

The real-world impact of the Eleventh Circuit's decision is important to the livestock industry. The Eleventh Circuit is home to large agricultural enterprises, and small producers of livestock and large buyers deal there regularly. Based on public information, in 2004 alone the Eleventh Circuit states produced about 8.4 percent of the nation's PSA-governed livestock, more than $8.9 billion in value. *See* USDA Economic Research Service, *State Fact Sheets*, *available at* http://www.ers.usda.gov/StateFacts/ (last visited Dec. 28, 2005).

According to the 2002 agricultural census—the most recent available online—ranchers and farmers within the three states

of the Eleventh Circuit produced more than 2.2 million head of cattle and calves that were sold into the market that year. *See* USDA National Agricultural Statistics Service, *2002 Census of Agriculture, available at* http://www.nass.usda.gov/ (last visited Dec. 28, 2005).

Those numbers show that cases similar to this one will continue to arise in the Eleventh Circuit. Unless this Court is convinced that the jurisprudence of the Eleventh Circuit is sound, that court will err in every case under the PSA and, more broadly, the antitrust rule of reason.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 04-12137

HENRY LEE "LEROY" PICKETT, MIKE CALLICRATE, *et al.*,
Plaintiffs-Appellants,

v.

TYSON FRESH MEATS, INC.,
Defendant-Appellee.

Aug. 16, 2005

Appeal from the United States District Court
for the Middle District of Alabama.

Before CARNES and COX, *Circuit Judges*, and MILLS*, *District Judge*.

CARNES, *Circuit Judge*:

Henry Lee Pickett is the owner of a cattle-producing farm located thirty-five miles south of Montgomery, Alabama. In this class action lawsuit he is the lead plaintiff representing a national class of cattle producers who sell their fed cattle—cows raised specifically for slaughter—to meat-packing plants exclusively on the cash market.

Tyson Fresh Meats, Inc., formerly Iowa Beef Processors, Inc. (IBP), is the largest meat-packing company in the United States. It processes thirty-five to forty percent of the steaks,

---

* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

hamburgers, and other consumer beef products sold in restaurants and supermarkets nationwide. Tyson purchases some cattle on the cash market from producers like Pickett. Since 1994 Tyson has also purchased a significant portion of its cattle through marketing agreements with cattle producers instead of from the cash market.

Pickett contends that Tyson has used marketing agreements to deflate the price of fed cattle on the cash market and the market as a whole in order to reap the benefits of lower prices. To stop Tyson from using marketing agreements and to recover for losses incurred from the lower prices that resulted on the cash market, Pickett sued Tyson. He brought the lawsuit on behalf of all cash market sellers claiming that Tyson had engaged in unfair practices and manipulated prices in violation of the Packers and Stockyards Act of 1921, 7 U.S.C. § 181 *et seq.*

The issues this case raises, and its procedural history, are best understood after a discussion of the cattle and meat-packing industries and the market where they meet.

I.

"Fed cattle" are born, raised, and marketed exclusively for slaughter. The process begins with the birth of a calf on a cattle-producing farm which exists solely to breed and raise cattle, feed them, and then sell them to meat-packing plants for processing into beef products. The first 200 days of a calf s life are spent feeding from her mother. After that, the calf is weaned and spends the next 200 days eating feed, grass, or wheat.

After the calf has been fed for 400 days, the producer sends it along with all the other calves being raised at the same time to a feed yard. The feed yard is a farm specifically designed to feed the calves intensively so they are in peak condition when sold to the meat packers. Some producers have feed yards on their farms, while others send their calves to third

party feed yards which not only finish feeding them but also broker the cattle to the meat packers on the producer's behalf.

At the feed yards, each calf is put into a pen with fifty to 200 other calves for the intensive feeding program, which usually lasts 120 days. When the feeding program is finished, each animal ideally weighs 1250 pounds, the industry's target weight.

Once the cattle in a pen have been fed intensively for 120 days, and have hopefully reached the target weight, they must be sold to a meat-packing plant within two weeks. If the fed cattle are not sold within that time period, they become too expensive for the feed yard to maintain and also become less desirable to the meat packers. They become too expensive because cattle gain usable weight more slowly after reaching 1250 pounds and eventually stop gaining it at all, but they still must be fed. They become less desirable to meat packers because the cattle start to gain more fat and the market is for meat not fat. The point is that the two-week window for selling fed cattle after they have been at a feed yard for 120 days is critical to the producers, the feed yards, and the meat packers. (For ease of reference, from this point on we will refer to fed cattle as simply "cattle," except where quoting.)

Once a meat packer purchases a pen of cattle, it has those cattle hauled to its factory and slaughters them. The packer then processes the carcasses into different cuts of meat (e.g., hamburger, New York strip, and filet mignon), packages the different cuts, and sells them to meat wholesalers, restaurants, and grocery stores.

The process we have described has been used to prepare cattle for the market since packers began buying pens of cattle directly from producers on the cash market about sixty years ago. (Before that, the buying and selling of cattle was done through agents at stockyards in major cities in the Midwest with Chicago being the largest.) During all but the

last decade or so, packers purchased cattle almost exclusively through the cash market.

This is how the cash market works. Buyers from the meat-packing companies spread out around the country to the different feed yards and inspect the pens of cattle that are ready to be sold. If the buyer likes the cattle in a pen, he makes an offer to the producer or feed yard operator. The producer or operator is free to accept or reject the packer's offer; in deciding whether to do so, he often considers offers being made for other pens of cattle around the country. (Much of this information is relayed over the telephone from one producer or operator to another.) Often, the producer or feed yard operator and the buyer from the packing plant haggle over the price. If they eventually agree on a price, the cattle in the pen are delivered to the packing plant seven days from the date of the agreement on price. The price the packer paid for the pen of cattle is reported to a central office and average prices are published each week.

In the mid-1980s a number of cattle producers began looking for a new method of marketing their cattle to packers, one that did not require as much time and hassle as negotiating every pen of cattle on the cash market. They came up with marketing agreements and eventually persuaded the packers, including Tyson, to begin using those agreements for some of their purchases. The use of marketing agreements spread slowly throughout the industry at first but began to pick up steam in the 1990s. By 1994 Tyson, among others, was using marketing agreements to procure a substantial part of the cattle it needed.[1]

Under the typical marketing agreement, a feed yard operator will call and tell the meat packer's buyer that he has

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[1] The record reflects that from 1994 to 2002 Tyson had purchased anywhere from twenty to fifty percent of its cattle supply through marketing agreements.

a pen of cattle at its peak and ready to be sold. The feed yard operator promises to have the cattle delivered to the factory for slaughter within two weeks, with the packer getting to pick the exact date of delivery within that two-week period.

The price paid for the cattle under the marketing agreement is pegged at the publicly released average cash-market price for the week prior to when the agreement is made. The agreement commonly provides that after the cattle are processed the price will be adjusted up or down based on the quality or the yield of the carcasses. The adjustment is quickly and easily calculated by Tyson as a matter of course in processing the cattle.

To summarize, the difference is that with marketing agreements, unlike cash-market purchases, the price is set not through bidding but automatically at the cash-market price the week before the agreement is made, the price is usually adjusted based on post-slaughter quality or yield, and the packer picks the actual delivery date within the two-week period that begins when the agreement is made.

II.

Pickett, and the class members he represents, sell their cattle exclusively on the cash market.[2] They claim that through

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[2] The class Pickett represents was initially certified as all cattle producers who sold cattle on the cash market to Tyson, including those who also sold cattle to Tyson through marketing agreements. We reversed this initial class certification after deciding that Pickett, who sold cattle to Tyson exclusively on the cash market and was challenging the legality of the marketing agreements, could not adequately and fairly represent the interests of producers who had sold cattle to Tyson through both the cash market and marketing agreements. *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280-81 (11th Cir.2000). On remand, the class definition was restricted to cattle producers who sold cattle to Tyson exclusively on the cash market. We denied Tyson permission to appeal this second class certification. *Iowa Beef Processors, Inc. v. Pickett*, No. 02-90002 (11th Cir. Mar 5, 2002). It is this narrower class that Pickett represents.

marketing agreements Tyson has been able to manipulate the price of cattle on the cash market.[3] Tyson is the largest meat packer in the country. It processes forty percent of all hamburgers and steaks on American dinner tables. Tyson slaughters 10 million cattle each year, nearly one-half of the 25 million cattle that are purchased and slaughtered by meat-packing plants in this country.

Pickett's theory is that Tyson has used marketing agreements and its large market share to artificially reduce prices on the cash market. Prices for cattle on the cash market are responsive to supply and demand. Pickett claims that by using marketing agreements Tyson has withdrawn a large amount of demand from the cash market, thereby substantially decreasing price pressure there. The result, in Pickett's view, is that producers selling on the cash market have gotten a lower price for their cattle. A reduced cash-market price benefits Tyson in two ways. First, Tyson is able to obtain the cattle that it still purchases on the cash market

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[3] In his complaint, Pickett claims that Tyson violated the Packers and Stockyards Act through the use of captive supply arrangements. "Captive supply" is Pickett's pejorative term for Tyson's procurement of cattle through either of two methods for purchasing cattle outside the cash market: marketing agreements and forward contracts. The parties agree that Tyson buys only about three percent of its cattle through forward contracts, which is too little to have any effect on the cash market price. For that reason, the briefs essentially ignore forward contracts, and we will too. Marketing agreements account for a significant amount of Tyson's cattle purchases, enough to affect price, and for that reason they are the focus of the briefs and this opinion. We will not be referring to marketing agreements as "captive supply" arrangements because, as the district court pointed out, the term is a misnomer. Under marketing agreements, a producer's cattle is captive for no more than two weeks. *Pickett v. Tyson Fresh Meats, Inc.*, 315 F.Supp.2d 1172, 1175 n. 1 (M.D. Ala.2004). Moreover, "captive" means nothing more in this context than that Tyson has a contractual right to delivery of the cattle in exchange for which it must pay the purchase price. It would be as descriptive to refer to these cattle as "contractual supply."

(millions of head each year) at a lower price. Second, because the price Tyson pays for marketing-agreement cattle is pegged to the average cash-market price, it pays less for those cattle too.

According to Pickett, the lower prices that Tyson pays for cattle are not an unintended consequence of its heavy use of marketing agreements to purchase much of its needs. To the contrary, Pickett alleges that those lower prices are the primary, intended consequence of marketing agreements. He claims that achieving lower prices in that manner constitutes an unfair practice and the manipulation of prices in violation of the Packers and Stockyards Act.

The case was tried for four weeks. Before the case was submitted to the jury, Tyson moved the district court for judgment as a matter of law under Fed.R.Civ.P. 50(a). The motion asserted, among other grounds, that Tyson had proven a number of competitive justifications for using marketing agreements, the factual existence of which were not disputed by any evidence. The district court almost granted Tyson's Rule 50(a) motion, observing that Pickett had presented "a very thin case," but it decided to reserve ruling on the motion to see what the jury would do. The district court explained that granting the motion before the jury verdict risked having to re-do the whole trial if the appellate court disagreed, and a retrial would be long and costly.

The jury's "verdict" consisted of answers to a number of interrogatories. Specifically, the jury was asked—"yes" or "no"—whether it found, by a preponderance of the evidence:

> 1. That there is a nationwide market for fed cattle?
>
> 2. That the defendant's use of [marketing agreements] had an anti-competitive effect on the cash market for fed cattle?

> 3. That the defendant lacked a legitimate business reason or competitive justification for using [marketing agreements]?
>
> 4. That the defendant's use of [marketing agreements] proximately caused the cash market price to be lower than it otherwise would have been?
>
> 5. That the defendant's use of [marketing agreements] injured each and every member of the plaintiffs' class?[4]

The jury answered "yes" to each of those five questions.

The verdict form instructed the jury that, if it did answer "yes" to all of those questions, it should answer these additional questions:

> 6. What amount, if any, do you find that defendant's use of [marketing agreements] damaged the cash market price of fed cattle sold to [the defendant] during the period from February 1, 1994, through October 31, 2002?
>
> 7. Did the defendant's use of [marketing agreements] depress the cash market price for fed cattle purchased by [the defendant] by an equal percentage for each year of the class period? If your answer is yes, by what percent?

The jury wrote "$1,281,690,000.00" in the question number 6 blank.[5] It answered question number 7 "no."

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[4] We have substituted "marketing agreement" for the term "captive supply" in the verdict form. *See ante*, at 1276 n. 3.

[5] Before submitting the questions to the jury, the district court had made clear to the parties that even if it entered a judgment for Pickett and the class, it had no intention of using as the amount of damages the jury's answer to question number 6: "I'm not—and no matter what verdict this jury comes back with, I'm not going to enter a judgment on that number if they bring one in because what we're talking about here includes people who are not members of the class." The court's point was that the amount of reduction in the cash market price of cattle was too broad a measure of

Following the verdict the district court granted Tyson's Rule 50(b) renewed motion for judgment as a matter of law, ruling "that [Pickett's] evidence is insufficient to support a finding that [Tyson] lacked a legitimate business justification for its use of [marketing agreements]." *Pickett v. Tyson Fresh Meats. Inc.*, 315 F.Supp.2d 1172, 1175

(M.D.Ala.2004). It entered final judgment for Tyson. This is Pickett's appeal from that judgment.[6]

III.

We review *de novo* a district court's grant of judgment as a matter of law, applying the same standard as the district court. *Cleveland v. Home Shopping Network. Inc.*, 369 F.3d 1189,

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damages, because it included those who sold some cattle outside the cash market, and those producers were not in the class.

[6] Before we get into the merits of the issues raised in this appeal, there is a procedural issue arising from the jury verdict form that we need to address. The form is unusual because it did not ask the jury to return a general verdict and the jury did not return one, even though it answered all of the interrogatories in favor of Pickett. A question arose at oral argument about whether an order granting Rule 50(b) relief properly may be entered where there has been no general verdict for either party. Cf. Fed.R.Civ.P. 49(a); *Mason v. Ford Motor Co.*, 307 F.3d 1271, 1274 (11th Cir.2002) ("When Rule 49(a) is employed, the jury makes specific factual findings; and the judge makes the ultimate legal conclusions based on those facts.").

The answer is found in Rule 50(b)(2)(B), which provides that "if no verdict was returned" by the jury, the district court is authorized to "direct entry of judgment as a matter of law" on a renewed motion for it. Fed.R.Civ.P. 50(b)(2)(B). This result makes sense. If the evidence that the plaintiff presented at trial is insufficient for the jury reasonably to return a verdict for the plaintiff, the defendant is entitled to judgment regardless of whether the jury did return a verdict. The absence of a verdict in these circumstances is not materially different from the situation where the district court grants a defendant's motion for judgment as a matter of law before the case is submitted to the jury, which is authorized under Rule 50(a).

1192 (11th Cir.2004). A district court should grant judgment as a matter of law when the plaintiff presents no legally sufficient evidentiary basis for a reasonable jury to find for him on a material element of his cause of action. *Id.* The court should deny it if the plaintiff presents enough evidence to create a substantial conflict in the evidence on an essential element of the plaintiffs case. *Watkins v. Sverdrup Tech., Inc.*, 153 F.3d 1308, 1313 (11th Cir.1998); *Bogle v. Orange County Bd. of County Comm'rs*, 162 F.3d 653, 659 (11th Cir.1998) ("[I]n order to survive a defendant's motion for judgment as a matter of law . . . the plaintiff must present evidence that would permit a reasonable jury to find in the plaintiffs favor on each and every element of the claim.").

A.

Pickett and his fellow class members contend that Tyson's marketing agreements violated the Packers and Stockyards Act. The relevant sections of the PSA make it:

> unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or . . .
>
> (e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce. . . .

Packers and Stockyards Act § 202(a), (e), 7 U.S.C. § 192(a), (e).

It is undisputed that Tyson is a meat packer and that the PSA applies to its business. The dispute is over what is an "unfair" practice and what constitutes "any act for the purpose or with the effect of manipulating or controlling prices."

Pickett contends he has established unfairness and price control or manipulation under the PSA by proving that Tyson's marketing agreements caused the cash-market price, and the overall market price, for cattle to be lower than it otherwise would be. If that were all Pickett were required to prove he might win, because there was evidence at trial to support the jury's finding that the use of marketing agreements has resulted in lower prices for cattle both on the cash market and the market as a whole.[7]

Tyson, of course, urges a contrary reading of the PSA. It takes the position that because the PSA was meant as a protection against anti-competitive practices by meat packers, Pickett must establish more than that the use of marketing agreements have decreased the price for cattle. He must establish that their use has adversely affected competition, which requires showing that marketing agreements have no pro-competitive justifications.

The district court resolved this issue in Tyson's favor. After it did so, this Court resolved the meaning of "unfair" practice in PSA § 202(a) in the same way. In *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir.2005), we held that "in order to succeed on a claim under the PSA, a plaintiff must show that the defendant's unfair, discriminatory or deceptive practice adversely affects or is likely to ad-

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[7] We say that Pickett "might win" because the critical evidence that the use of marketing agreements caused lower prices in the markets was the testimony of Professor Taylor, an expert witness for Pickett, and there are *Daubert* issues involving his testimony. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The existence and seriousness of those issues are partly reflected in the district court judge's comment that if he were the factfinder, "I'd say, Dr. Taylor, you're nuts." Given the basis of our decision to affirm the district court's judgment on grounds independent of any Daubert issues, we can assume for present purposes that Tyson's use of marketing agreements did lead to lower prices in the cattle markets.

versely affect competition." *Id.* at 1303. This, we explained, is consistent with the purpose and intent behind the PSA. "At the time of enactment, the chief evil Congress feared was the monopoly of the packers." *Id.* at 1302 (citing *Stafford v. Wallace*, 258 U.S. 495, 514-15, 42 S.Ct. 397, 401, 66 L.Ed. 735 (1922)). "The primary purpose of the PSA was 'to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry.'" *Id.* (quoting H.R.Rep. No. 85-1048, at 1 (1958), U.S.Code Cong. & Admin.News 5212, 5213). It was aimed at halting practices whose purpose was to destroy competition. *Id.* The *London* decision settles in this circuit that by "unfair" practice, PSA § 202(a) means a practice that does or is likely to adversely affect competition. Id. at 1303; *see also Adkins v. Cagle Foods JV, LLC*, 411 F.3d 1320, 1324 n. 6 (11th Cir.2005) 1324 n.6 (11th Cir. 2005).

In the *London* case there was no PSA § 202(e) price manipulation or control claim, as there is in this case, but the principles and purposes behind these two closely related provisions of the Act are the same. Section 202(e) is aimed at preventing a particular type of unfairness in the meat-packing industry, namely, price manipulation and control and the creation of monopolies. With section 202(e), as with section 202(a), "the chief evil Congress feared was the monopoly of the packers," and the primary purpose "was to assure fair competition and fair trade practices." *London*, 410 F.3d at 1302. For the same reasons a section 202(a) unfairness claim requires a plaintiff to show an adverse effect on competition, so does a section 202(e) price manipulation or control claim.

It was not Congress' intent in enacting the PSA to interfere with a meat packer's business practices where those practices did not interfere with competition. *See IBP, Inc. v. Glickman*, 187 F.3d 974, 978 (8th Cir.1999) ("[W]e are . . . mindful that the purpose behind the Act was not to so upset the traditional principles of freedom of contract, as to require an entirely

level playing field for all." (quotation omitted)). If a packer's course of business promotes efficiency and aids competition in the cattle market, the challenged practice cannot, by definition, adversely affect competition. *See London*, 410 F.3d at 1304 ("We note that elimination of a competitive impact requirement would subvert the policy justifications for the PSA's adoption."); *see also Jackson v. Swift Eckrich*, Inc., 53 F .3d 1452, 1458 (8th Cir.1995) ("We are convinced that the purpose behind § 202 of the PSA, 7 U.S.C. § 192, was not to so upset the traditional principles of freedom of contract. The PSA was designed to promote efficiency, not frustrate it."); *Glickman*, 187 F.3d at 978 (same); *Griffin v. Smithfield Foods. Inc.*, 183 F.Supp.2d 824, 828 (E.D.Va.2002) (same).

In this case, the jury found that Tyson's use of marketing agreements "had an anti-competitive effect on the cash market for fed cattle" and that Tyson "lacked a legitimate business reason or competitive justification for using" marketing agreements. The district court, in granting Tyson's Rule 50(b) motion for judgment as a matter of law, concluded that Pickett had failed to present any evidence to call into question Tyson's evidence establishing that marketing agreements: (1) allow the company to keep up with competitors in the meat-packing industry who also were reaping the cost benefits of marketing agreements; (2) provide the company with a reliable and consistent supply of cattle to keep its factories at full capacity; (3) reduce the transaction costs of having to negotiate individually for 200,000 pens of cattle a year to meet its needs; and (4) permit the company to match its cattle purchases with the needs of its customers. *See Pickett*, 315 F.Supp.2d at 1175-77. In the district court's view, "the trial record is barren of any evidence which would permit the jury to conclude that [Tyson] lacked a legitimate business justification for its use of [marketing agreements]." *Id.* at 1176.

Pickett contends that the district court got it wrong. He argues that there was evidence to support a finding that all of Tyson's competitive justifications for using marketing agreements were pretextual, thus rendering reasonable the jury's finding that Tyson had no competitive justification for doing so. The pretext issue applied to the justifications Tyson asserted is what this case turns on. If there is evidence from which a jury reasonably could find that none of Tyson's asserted justifications are real, that each one is pretextual, Pickett wins. Otherwise, Tyson wins.

B.

We mentioned earlier in this opinion that marketing agreements were originated by cattle producers, not meat packers. Some cattle producers insist on selling their cattle through those agreements and will not use the cash market. Others prefer to use marketing agreements for some or all of their cattle. Tyson's first competitive justification for using the marketing agreements is that it must use them in order to have access to the cattle of those producers. Otherwise, it will lose all of that supply, which constitutes a significant share of the market, to its competitors who do use the agreements. As the district court found, restricting its own use of marketing agreements "would pose problems for [Tyson], as it would have fewer cattle to choose from, and the quality and reliability of its cattle supply would likely suffer." *Id.* at 1176. In other words, Tyson needs to use marketing agreements to meet the competition.

Tyson presented a number of witnesses who testified to the factual premise of this justification: Tyson's competitors use marketing agreements and Tyson would suffer a serious competitive disadvantage if it did not use them. Some of Pickett's own witnesses testified to the same thing. No one disputed this justification as a factual matter. Instead, Pickett's position is that this justification is legally insufficient. He insists that a practice of purchasers that is unfair to sellers should not be

allowed on the ground that all purchasers do it. In other words, there ought not be a "meet the competition" defense to conduct that the PSA otherwise prohibits.

The law does recognize a meet the competition defense in another context. The Robinson-Patman Act, which amended the Clayton Antitrust Act, generally proscribes price discrimination between different purchasers of commodities of like grade and quality. Robinson-Patman Act § 2(a), 15 U.S.C. § 13(a). That is, a commodities dealer cannot charge its favored purchasers a lower price while selling at a higher price to others. The Robinson-Patman Act, however, recognizes an exception and provides for an absolute defense if a merchant's lower price to a purchaser "was made in good faith to meet an equally low price of a competitor." *Id.* 13(b). That defense has been roundly criticized. *See Hoover Color Corp. v. Bayer Corp.*, 199 F.3d 160, 163 (4th Cir.1999) (collecting critiques of the Robinson-Patman Act by Justice Frankfurter and Judges Bork and Posner).

In any event, the PSA is not the Robinson-Patman Act. Unlike the latter, the PSA does not expressly provide a meet the competition defense. Congress could have written that defense into the PSA just as it did in the Robinson-Patman Act. We would be most reluctant to do Congress' writing for it, especially when the wisdom of the provision we are asked to write into the statute is debatable. But we need not go so far as to reject the meet the competition defense in PSA cases, because in this case that defense would not matter. It would not matter because Tyson has offered other justifications for its use of marketing agreements, and those justifications are legally permissible and factually uncontradicted in the record.

C.

Tyson's second proffered competitive justification for marketing agreements is that their use provides the company with a reliable and stable supply of cattle for its packing

plants. This is an unquestionably legitimate justification. *See Glickman*, 187 F.3d at 978 ("The record demonstrates that the [business practice] is an effort by IBP to have a more reliable and efficient method of obtaining a supply of cattle. The [PSA] was designed to promote efficiency, not frustrate it." (quotation omitted)).

Tyson contends that, because there are not enough cattle in the market to meet the demands of the entire packing industry from week to week, and because it must purchase 200,000 head of cattle each week to keep its processing plants running at full productive capacity, the company has to struggle to keep a constant supply of cattle coming into its plants. Before 1994 Tyson had to negotiate individually for each pen of cattle it purchased. Its competitors were also negotiating on the same pens of cattle, and the producers were free to accept or reject Tyson's offered price for a pen. If Tyson's offers were rejected for enough pens, the company could not fill its factory for the next week and it would not have enough product to meet its customers' demands.

Marketing agreements make the inventory crunch much less crunchy for Tyson. They are negotiated two weeks in advance of delivery of the cattle, and Tyson picks the exact date of delivery within that two-week period. These features provide Tyson with greater ability to plan its purchases and to keep a steady flow of cattle coming into its plants. By contrast, the cash market provides Tyson with no leeway about the delivery date, because cattle purchased on it are always delivered seven days after purchase. On the cash market there is a greater risk that Tyson's buyers will purchase too little cattle for its needs, or too much for its plants to process within the constrictions of the delivery dates. The economic effect of these differences between the two procurement methods is critically important for a large meat packer whose profit depends on keeping its plants operating at full capacity without interruptions.

The underlying facts relating to this justification were not disputed at trial. Both Tyson's and Pickett's witnesses testified to them. James Herring, president of Friona Industries, a collection of feed yards in the Texas panhandle, testified that buying cattle through marketing agreements guarantees for Tyson a certain number of cattle per week. Lee Borck, the president and principal negotiator for the Beef Marketing Group, a consortium of thirteen feed yards in the Midwest, testified that marketing agreements ensure that Tyson will "have a percentage of their cattle that are going to be procured for a plant that's difficult to procure cattle for." Jerry Hausman, an economics professor from the Massachusetts Institute of Technology, testified that "what marketing agreements do is it helps [Tyson] to better schedule its plants. And by cutting down the variability, they're going to get greater capacity utilization and higher profits." And Bruce Bass, Tyson's head buyer, stated that marketing agreements ensure a consistent supply of cattle for the company's processing plants.

Professor Catherine Durham, one of Pickett's expert economists, agreed with this assessment when she was asked about the use of marketing agreements on cross-examination:

> Q. You would agree with me, Professor Durham, that marketing agreements also help [Tyson] guarantee a minimum supply of cattle at the plants that get marketing agreement cattle, right?
> A. Yes.
> Q. And [Tyson] has a valid business interest in having a steady supply of cattle at its packing plants, right?
> A. Yes.

The economics of this are simple. As Professor Hausman explained, being able to keep its processing plants operating at capacity has increased Tyson's efficiency. Keeping the doors to its plants open and the machinery running is a fixed cost for Tyson. No matter how many cattle the plant proc-

esses on a given day, Tyson has fixed costs for the facility and equipment, the electricity used to run the plant, and the salaries of a minimum number of employees needed to run the plant. Whether the plant slaughters 2,000 head or 20,000 head of cattle on a given day, the fixed cost will be the same.

If Tyson slaughters 20,000 head of cattle, the fixed costs of operating the plant are divided by a factor that is ten times larger than when it slaughters only 2,000 head. The more cattle Tyson processes on a given day, the less the fixed cost per head. By ensuring that the processing plants are consistently filled and operate at or near capacity, the use of marketing agreements provides Tyson with a more cost-effective operation. This result, which is entirely in harmony with the goals of the PSA, *see Jackson*, 53 F.3d at 1458 ("The PSA was designed to promote efficiency, not frustrate it."), is a legitimate, pro-competitive justification.

Pickett offered no evidence to dispute the existence of this justification. Instead, through examination of Tyson's witnesses, Pickett simply brought out the unremarkable fact that if Tyson were willing to pay "a high enough price" or "throw our billfold out the window" it could get from the cash market as many cattle as it wanted for its processing plants (and even then it would be difficult). Of course, in hypotheticals where economic constraints are assumed away, economic problems are not problems. But this is not a hypothetical case. Tyson is an actual business that operates in the real world through real markets where there are real economic limits. Tyson has competitors who stand ready, willing, and able to undercut the price of its product if it pays too much for the raw materials used to produce that product.

D.

Tyson's third proffered competitive justification for purchasing some of its cattle through marketing agreements is that doing so reduces its transaction costs by eliminating the

need to negotiate for each individual pen of cattle, as it must on the cash market. With the cash market, buyers for Tyson are constantly on the road inspecting pens of cattle in a never-ending effort to see if the cattle in each pen match the quality the company needs to fill its customers' orders. Once the buyer finds a pen that appears to fit the needs, he places a bid with the producer. The producer usually is conducting simultaneous negotiations with one or more of Tyson's competitors for the same pen. After days of going back and forth, the producer chooses the highest bid, which may or may not be Tyson's. This process is costly for both the producers and Tyson because it takes so much time. Tyson has to successfully outbid other packers for more than 1,000 pens every week (the pens each consisting of between fifty and 200 cattle) in order to meet its need for 200,000 head per week.

As a number of Tyson's witnesses testified, marketing agreements eliminate the time and energy spent by packers and producers negotiating for individual pens. Under the agreements the price of the cattle is set at the average cash-market price (plus a yield adjustment that is determined after processing). Mr. Borck, the principal negotiator for BMG feed yards, testified that when using the cash market he was spending three or four days a week on the phone with meat packers negotiating the price for his peak cattle. This was "not very productive time." With the marketing agreement system, Mr. Borck estimated that it now takes "half a day a week" to sell the peak cattle to the packer. He spends the rest of this "high-priced management time to try and be more efficient in our operations and in the caretaking of the cattle."

Other cattle producers and feed yard operators agreed with Mr. Borck. Jim Keller, a feed yard operator in Kansas, testified that he preferred marketing agreements because he "didn't have to waste time talking about prices. Some people like that. They like haggling over price. I don't. I don't. I always think I could probably be doing something different."

Professor Hausman testified that because the price in marketing agreements is set, "marketing agreements are going to decrease transactions costs and therefore decrease the costs for [Tyson] and also likewise for the feedlot operator as well." This was a valid business justification, he continued, "because it's economically efficient to decrease your transactions costs. Anything that decreases costs like that increases economic efficiency, both for [Tyson], for the feedlot operator, and also for the U.S. economy." Mr. Bass, Tyson's head buyer, confirmed this. He said that from 1994 to 2002, Tyson has been able to decrease the number of buyers it employs by about fifteen percent, partly because of the increasing popularity of marketing agreements among cattle producers and feed yards.

Pickett did not dispute any of this. In fact, many of his witnesses agreed with Tyson's witnesses that marketing agreements relieve producers and packers from the burden of spending their time on negotiating prices, instead of on raising and processing cattle. Brett Gottsch, a cattle producer from Nebraska who testified for Pickett, conceded that with marketing agreements buyers and feed yard operators do not need to "go through the process of bidding and negotiating prices." Robert Rothwell, a cattle producer and feed yard operator in Nebraska, testified that purchasing cattle through marketing agreements requires less time and energy than purchasing cattle through the cash-market system. And Jeff Biegert, another producer from the Midwest, joked that with marketing agreements, the buyers for packing companies "could be playing golf if [they] wanted to, and the cattle will still get marketed."

In sum, it was undisputed at the trial that marketing agreements are a more efficient means for both meat packers and cattle producers to operate in the market. It was undisputed that use of the agreements has lowered the transaction costs of producers and meat packers, including Tyson.

Witnesses for both parties recognized that these are pro-competitive benefits for the industry. Those benefits are entirely consistent with the goals of the PSA. *See Glickman*, 187 F.3d at 978.

E.

Tyson's final competitive justification for using marketing agreements is that they allow the company to pay for each head of cattle in a pen individually based on the quality of the meat, rather than paying for the entire pen "on the average." Among other benefits, this gives producers an incentive to provide packers with the quality and yield of meat they need to satisfy their customers' demands.

In the cash-market system, buyers for the packing companies pay a single price for an entire pen of cattle which results in an average price per head in the pen. With this "on the average" system, producers can put some of their less desirable cattle—those with less quality meat or lower usable meat yields—in the same pen as high-quality, high-yield cattle. The packer who buys that pen gets some cattle that match its customers' needs and some that do not. The other side of the problem is that producers with a large share of high-quality or high-yield cattle do not always get rewarded for it. This disparity between the quality and yield of the cattle and the price paid for them on the cash market, which is a disparity that can go either way, is the result of buyers not being able to closely inspect and assess the quality and yield of fifty to 200 head of cattle in each of the many pens that they must haggle over in the cash market.

With marketing agreements, meat packers also buy an entire pen of cattle but with an important difference: the price paid for the cattle is adjusted up or down after slaughter to reflect the actual quality and yield of the meat. The final price depends not on the buyer's in-the-field estimate of the meat that a pen of cattle will produce, but on the actual meat that

does result after slaughter. This feature of marketing agreements takes away the incentive for producers to mix low-quality and low-yield cattle in with better ones, and it gives them an incentive to increase the overall quality and yield of their cattle. Both results are good for the industry and for competition.

The factual premise for this justification was not disputed at trial. A number of witnesses, both for Tyson and for Pickett, testified to it. Mr. Gottsch, who testified for Pickett, stated that one advantage of marketing agreements is that the packer pays the producer for each cow in the pen based on the quality. Mr. Rothwell, another of Pickett's witnesses, agreed that individual pricing was a "valid business justification" for buying and selling cattle through marketing agreements. And, Mr. Biegert, one of the Nebraska producers testifying for Pickett, conceded that "paying a feedyard a premium for really high quality cattle will create economic incentives that go all the way back to the [producer] and can cause the [producer] to strengthen his cowherd."

Professor Hausman, Tyson's expert, agreed with the three producers who testified for Pickett. He said that by paying for each head of cattle, rather than paying for the pen on the average, the packer creates an economic incentive for the producers to grow better cattle. He went on to explain that "if you get paid the average, you don't have an economic incentive nearly as much; because if you have some bad cattle and some good cattle, they sort of average out." Mr. Keller, the feed yard manager from Kansas, concurred with the professor. He testified that one thing that "really bothered" him about the cash market was that "all the cattle were getting sold for the very same price. All cattle, no matter what they were, what quality, everything getting sold on the same price."

Because price is adjusted to fit actual quality and yield, marketing agreements provide Tyson with another, related

competitive benefit. Like most other companies in our complex economy, Tyson has a specific niche market for its products—in its case, steaks and hamburgers. It is a volume meat dealer; its largest customers are supermarket chains. To provide for its customers in the most inexpensive and efficient way, Tyson prefers large, high-yielding cattle to leaner, high-quality cattle. High-yield cattle tend to have middle-grade meat, and that is fine with Tyson. By focusing its procurement on high-yield instead of high-quality cattle, Tyson is better able to meet the needs of its customers at lower costs.

Through marketing agreements, Tyson provides an incentive for producers to raise and sell more high-yield cattle. On the cash market, the best Tyson can do is have its buyers attempt to purchase pens that appear to have the highest number of high-yield cattle. But that is an inexact science. With marketing agreements, the post-slaughter price more closely matches the actual yield, which provides an incentive for producers to supply Tyson with the high-yield cattle it needs. *See Griffin*, 183 F.Supp.2d at 828-29 (rejecting pork producers' PSA claim in part because "[t]he Defendants decided that the guess work required to fulfill their needs at cash markets was inefficient for themselves and the consumer").

The factual existence of this pro-competitive benefit was not disputed at trial. Counsel for Tyson asked Professor Hausman: "[I]f a packer is buying cattle under a marketing agreement, can it do anything to try to influence the type of animals that the participating feedyards produce?" Professor Hausman responded:

> Yes. It has—it offers money. That's what it does. So it has this grid and it says, you know, if we want higher yield, we'll pay you more money for higher yield. If it pays more money, the feedyard operator is going to say,

> you know, more money is good for me and my cattle owners, so I'm going to try to increase yield.

And, the incentive works. Since 1994, when it began to significantly increase its use of marketing agreements, the cattle that Tyson has purchased from marketing agreements has had a higher yield than the cattle it has purchased on the cash market.

Instead of producing evidence to dispute the existence of this advantage of marketing agreements, Pickett argues that the benefit could be obtained through the cash market if it were changed. One of Pickett's two experts, Professor Durham, testified that the cash market, like marketing agreements, can also provide incentives for quality by making the same sort of offers and discounts and premiums. She did not, however, contradict the fact that, as Pickett's witnesses described its current operation, the cash market does not provide incentives for quality and yield. We deal with real markets the way they are, not with how they might be redrawn on the blackboard in a classroom.

Pickett also argues that cattle sold on the cash market is of higher quality than cattle sold through marketing agreements. Professor Hausman, Tyson's expert, agreed that "those feedlots that sell cash-only cattle have a significantly higher percentage of prime and choice grades than the feedlots that sell marketing agreement cattle." That is, however, beside the point because Tyson is not looking for high-quality meat. As we have already explained, Tyson wants high-yield meat, which tends to be middle-quality. Tyson structures its marketing agreements to encourage producers to raise high-yielding cattle, not high-quality cattle. It uses marketing agreements to obtain the kind of meat that it needs to supply its customers at a competitive price. Tyson and its customers, not Pickett, get to decide what kind of meat it needs.

F.

In sum, while Pickett presented evidence at trial that Tyson's marketing agreements have decreased the price of cattle on the cash market and on the market as a whole, he did not present any evidence from which a reasonable jury could conclude that Tyson lacked pro-competitive justifications for using the agreements. The evidence is undisputed that marketing agreements provide a more reliable and stable supply of cattle for meat packers, reduce their transaction costs for purchasing cattle, and allow them to better match price to actual quality and yield. A jury could not reasonably find, as the one in this case did, that Tyson had no competitive jurisdiction for using marketing agreements.

The jury may have been swayed by more than the evidence relating to competition and markets. In his opening statement, Pickett's counsel sounded this theme:

> I want to pause to mention to you that we're talking here about a part of America's economy that is perhaps in some ways the most romanticized part. We celebrate the cattle business in our books and in our music and in our literature and in our movies, and have for years. And over the years, the one thing that the cattle business has stood for during the growth and the development of our country has been independence, fierce independence, meaningful and forceful independence.

While talk about the independence of cattle farmers has emotional appeal, the PSA was not enacted to protect the independence of producers from market forces. It was enacted to prevent unfair practices, price fixing and manipulation, and monopolization. *See London*, 410 F.3d at 1301 ("At the time Congress enacted the PSA, the chief evil feared was the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer,

who buys." (quotations and alternations omitted)). The PSA was enacted to ensure that the market worked, and markets are notoriously unromantic.

The district court in *Griffin v. Smithfield Foods, Inc.*, was faced with a similar argument by pork producers against the procurement methods of pork packers. In that case, Smithfield, the largest pork packer, had switched from buying its hogs on the cash market to buying them through marketing agreements or obtaining them from farms that Smithfield itself owned. The producers who did not want to sell their hogs through marketing agreements sued under the PSA, contending, as Pickett contends here, that the packer's conduct was unfair and had the effect of manipulating or controlling prices. *Griffin*, 183 F.Supp.2d at 825.

In rejecting the pork producers' claim, the court in that case explained that the lawsuit was premised not on Smithfield's unwillingness to do business with the producers. *Id.* at 828. Instead, the core of the producers' complaint was that Smithfield had "timing and quality control standards that the [producers] find an affront to their independence." *Id.* This, the court explained, was not enough to prohibit a more efficient, consistent, and consumer-friendly purchasing method:

> While such independence may be a virtue in many respects, the family farm, the corner grocer and the main street specialty store have all fallen victim to the direction in which the country's economy has developed. No degree of sympathy for the [producers'] difficulty in maintaining their traditional way of doing business translates to wrongdoing on the part of [Smithfield].
>
> . . . .
>
> The [producers'] evidence demonstrates that economic developments in their industry have overtaken them; their evidence does not demonstrate that their economic

> woes were caused by any actionable wrongdoing of Smithfield under the PSA or any other theory.

Id. at 828, 830.

Exactly the same is true here. Pickett and his fellow class members could have entered into marketing agreements with Tyson. Many of the producers who testified on Pickett's behalf had themselves sold cattle through them. With marketing agreements, producers do lose some of their independence because meat packers get to dictate the date of delivery and adjust the price to the actual yield of the cattle. Some producers find the advantages of marketing agreements worth any loss of independence; it was, after all, producers who came up with the idea of marketing agreements. Other producers, like Pickett, place a higher premium on independence and prefer the cash market. They are entitled to their preferences, but they are not entitled to force those preferences on other producers and on the packers. *See Glickman*, 187 F.3d at 977 ("[W]e are . . . mindful that the purpose behind the Act 'was not to so upset the traditional principles of freedom of contract . . . . '" (quoting *Jackson*, 53 F.3d at 1458)).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
M.D. ALABAMA
NORTHERN DIVISION

No. CIV. 96-A-1103-N.

HENRY LEE PICKETT, *et al.*,
Plaintiffs,

v.

TYSON FRESH MEATS, INC.,
Defendant.

April 23, 2004

MEMORANDUM OPINION

STROM, *Senior District Judge.*

This matter is before the Court on defendant Tyson Fresh Meats, Inc.'s motion for judgment as a matter of law, or for new trial (Filing No. 664), filed with the Court on February 25, 2004.

I. Background

Trial of this case began on January 12, 2004. On January 30, 2004, plaintiffs rested and defendant moved for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure. The Court took defendant's motion under advisement. Defendant then presented its evidence and plaintiff presented rebuttal evidence. All parties rested on February 5, 2004. Defendant renewed its motion for judgment as a matter of law, and the plaintiff also moved for judgment as a matter of law. These motions were taken under ad-

visement. The Court submitted the case to the jury on February 10, 2004.

On February 17, 2004, the jury returned a verdict. The jury answered five interrogatories affirmatively on the verdict form, finding that plaintiffs established, by a preponderance of the evidence, that (1) there is a nationwide market for fed cattle; (2) defendant's use of captive supply had an anti-competitive effect on the cash market for fed cattle; (3) defendant lacked a legitimate business reason or competitive justification for using captive supply; (4) defendant's use of captive supply proximately caused the cash market price to be lower than it otherwise would have been; and (5) defendant's use of captive supply injured each and every member of plaintiffs' class. In addition, the jury found that defendant's use of captive supply damaged the cash market price of fed cattle sold to defendant during the class period by One Billion, Two Hundred Eighty One Million, Six Hundred Ninety Thousand Dollars ($1,281,690,000.00).

Subsequently, the defendant filed a motion for judgment as a matter of law or for new trial with a supporting brief

Plaintiffs filed a brief in response and defendant filed a reply brief. The Court has reviewed the briefs as well as pertinent parts of the trial record and now concludes that plaintiffs' motion for judgment as a matter of law should be denied, and defendant's motion for judgment as a matter of law should be granted on the grounds discussed herein and for the following reasons.

II. Discussion

1. Standard of Review

In reviewing defendant's motion for judgment as a matter of law, pursuant to Rule 50 of the Federal Rules of Civil Procedure, the Court considers whether sufficient conflict exists in the evidence to necessitate allowing the jury verdict

to stand, or whether the evidence is so weighted in favor of the defendant that the defendant must prevail as a matter of law. *Thosteson v. United States*, 331 F.3d 1294, 1298 (11th Cir.2003) (citing *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1244 (11th Cir.1999) (en banc)). Although the Court reviews the evidence in the light most favorable to the plaintiffs, and draws all reasonable inferences in favor of the plaintiffs, the plaintiffs "must put forth more than a mere scintilla of evidence suggesting that 'reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions.'" *Thosteson*, 331 F.3d at 1298 (citing *Mendoza*, 195 F.3d at 1244) (quoting *Walker v. NationsBank of Florida, N.A.*, 53 F.3d 1548, 1555 (11th Cir.1995)). The existence of a genuine issue of material fact precludes judgment as a matter of law, but the presence of "a mere scintilla of evidence" does not create a genuine issue of material fact. *Mendoza*, 195 F.3d at 1244. The Court is mindful of this standard as it analyzes the issues presented in defendant's motion.

2. Analysis

Defendant sets forth numerous arguments for why the Court should grant its motion for judgment as a matter of law. Defendant contends that there is no legally sufficient evidentiary basis for a reasonable jury to have found (1) a nationwide market for fed cattle; (2) that defendant's use of marketing agreements and forward contracts had an anti-competitive effect; (3) that defendant lacked a legitimate business reason or competitive justification for using captive supply; (4) that defendant's use of captive supply caused the cash market price to be lower; (5) that each member of the class suffered impact or injury; and (6) that there were damages sustained from the alleged violations of the Packers and Stockyards Act. See Filing No. 665. Plaintiffs, however, argue that the record contains evidence such that a reasonable jury could find in favor of plaintiffs on each essential element of their claim.

a. Legitimate Business Justifications for Using Captive Supplies

The Court finds that the evidence is insufficient to support a finding that defendant lacked a legitimate business justification for its use of captive supplies.[1] Plaintiff attempts to counter this argument by arguing that (1) there is a less restrictive manner in which defendant could achieve the same benefits (i.e., through the cash market); and (2) defendant's justification of "meeting the competition" is invalid because defendant cannot justify its unlawful behavior by competing with other unlawful behavior. The Court will consider each of these two arguments.

First, plaintiffs argue that they were entitled to show that there was a less restrictive way of achieving the same business justifications. Plaintiffs contend that they established at trial that defendant could achieve all of its claimed justifications through purchases on the cash market, which would constitute a less restrictive manner of achieving the justifications.

In response to defendant's motion for judgment as a matter of law, plaintiffs attempt to rebut several of defendant's claimed business justifications by arguing that those justifications could be achieved on the cash market. During the conference on jury instructions in this case, plaintiffs requested that the Court instruct the jury that, if defendant could achieve its claimed justifications in the cash market,

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[1] Although the marketing arrangements have been generally referred to in this case as "captive supply," that label is somewhat of a misnomer. As an initial matter, these marketing arrangements were initiated by cattle producers starting back in the early 1980's. The evidence is undisputed that, at least with respect to some of the marketing agreements, the producer had no obligation to deliver the cattle to the packer until such cattle were designated by the producer for delivery. The defendant's obligation to purchase the cattle did not attach until such delivery designation occurred, which usually was not until two weeks before delivery.

then such justifications were not "legitimate" business justifications. See Trial Transcript 2/9/04 at 3107:10—3108:10; 3111:12—3112:8; 3119:18-24. After reviewing the issue, the Court rejected that argument. See Jury Instruction No. 16. The Court adheres to its earlier position and finds that the "less restrictive alternative" argument offered by plaintiffs is without merit. The Court's position is supported by an abundance of case law. See generally *Armour & Co. v. United States*, 402 F.2d 712, 725 (7th Cir.1968); *Griffin v. Smithfield Foods, Inc.*, 183 F.Supp.2d 824. 827-28 (E.D.Va.2002); *Jackson v. Swift-Eckrich, Inc.*, 836 F.Supp. 1447 (W.D.Ark.1993), *affd*, 53 F.3d 1452 (8th Cir.1995).

Absent the "less restrictive alternative" argument, the trial record is barren of any evidence which would permit the jury to conclude that defendant lacked a legitimate business justification for its use of captive supply. The evidence reveals that captive supply transactions permit defendant to achieve a reliable and consistent supply of fed cattle, allowing it to operate its plants in an efficient manner. Numerous witnesses, called by both the plaintiffs and defendant, confirmed that the use of captive supply helps defendant ensure a reliable and consistent supply of fed cattle. Plaintiffs claim that such justification is not a "legitimate" justification because defendant could achieve those same results on the cash market. Filing No. 678 at 34-35, ¶¶ 80-81. Plaintiffs apparently do not contest the fact, however, that the use of captive supply does indeed lead to a consistent and reliable supply of fed cattle. A packer does not violate the Packers and Stockyards Act when its conduct is undertaken "in order to have a more reliable and efficient method of obtaining a supply of cattle." *IBP. Inc. v. Glickman*, 187 F.3d 974, 978 (8th Cir.1999).

Defendant also produced evidence at trial that it was justified in acquiring cattle through captive supply transactions because it needed to do so to "meet the competition."

Defendant argues that the evidence is undisputed that it would lose sources of cattle if it did not offer arrangements with cattle producers that its competitors such as Swift and Excel were offering. Plaintiffs, however, argue that this cannot qualify as a legitimate business justification because the defendant cannot "engage in illegal activity to compete with another who is breaking the law. One wrong is not set right by more wrongs." Filing No. 678 at ¶ 35, 82.

Plaintiffs' argument on this issue is flawed. The evidence at trial was undisputed that if defendant was unable to offer captive supply arrangements to producers, it would have a much smaller pool of producers from which to buy cattle because those producers wishing to sell cattle via marketing agreements, formula sales, or forward contracts would sell their cattle to defendant's competitors. This would pose problems for the defendant, as it would have fewer cattle to choose from, and the quality and reliability of its cattle supply would likely suffer. Thus, defendant needed to use these sources of supply to be able to compete effectively with Excel, Swift, and other packers.

Defendant's use of captive supply arrangements is supported by the legitimate business justification of competing in the industry. Plaintiffs did not offer any evidence at trial suggesting that the defendant would be able to compete if the competitors were allowed to continue to use captive supply, but defendant was forced to discontinue such procurement methods. See *Swift & Co. v. Wallace*, 105 F.2d 848 (7th Cir.1939) (setting aside a finding of "unreasonable preference" where the packer had extended allegedly preferential credit terms in *bona fide* response to its competition offering the same terms).

Although the record indicates that defendant's competitors do utilize marketing agreements, forward contracts, and other forms of captive supply transactions, it is significant that there is no evidence before the Court to suggest that such

conduct is illegal. The use of marketing agreements, joint ventures and forward contracts is not, *per se*, violative of the Packers and Stockyards Act. Generally, such conduct only amounts to a violation of the Act if it constitutes an "unfair practice," involves price manipulation, or violates some other specific provision of the Act. There is no evidence that defendant's competitors' use of these supply arrangements violated the Act, nor is there any evidence that the use of such arrangements is per se illegal.

b. Damages to All Class Members

The Court finds that the evidence does not support a finding that each member of plaintiffs' class was injured. In Instruction No. 19, the Court instructed the jury:

> To establish that IBP's use of captive supply caused an injury to each and every member of the plaintiff class, plaintiffs need not prove such injury with exactitude, but must establish that the members of the class were injured in some measurable amount. Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture. Instruction No. 19.

Plaintiffs' expert, Dr. Robert Taylor, testified that defendant's use of captive supply did not have a statistically significant impact on the cash market price for fed cattle during the years 1999 and 2000. See Trial Transcript 2/5/04 at 3040:3-13; 3051:22—3052:17. Presumably, there are class members whose cash market sales of fed cattle to defendant are limited to the years of 1999 and 2000; if so, the evidence does not establish that those class members suffered any adverse impact or injury. In this case, the fact-finder is left to speculate as to whether any such class members suffered an adverse impact or injury during these two years, and the jury verdict cannot be based on such speculation or conjecture. Plaintiffs problems of proof on this issue are further compounded by their inability to identify the current members of the class, or

even the number of class members. The Court is mindful that plaintiffs were not required to prove damages with exactitude, but the Court is satisfied that plaintiffs have not met their burden on this issue.

c. Class-wide Damages

Plaintiffs' evidence at trial failed to establish damages or, in the alternative, a formula from which damages could be calculated at a later claims procedure. Defendant argues that plaintiffs had the burden at trial "of either proving damages to the class *or* of establishing a formula that could be used to establish damages in a later proceeding." Filing No. 665. Defendant correctly points out that plaintiffs did not prove, at trial, the extent of class-wide damages or the volume of class members' sales on the cash market. Because plaintiffs' evidence of damages included damages caused to the entire cash market, including damages suffered by non-class members, defendant argues that plaintiffs' damages evidence at trial is "completely irrelevant." Defendant contends that the jury did not adopt a formula for calculating damages in a claims process, and that the absence of such formula precludes any claims proceeding in the future.

On July 16, 2003, the Court proposed bifurcating the trial. See Filing No. 511. Under the Court's proposal, the parties would have first tried this case to a jury solely on the issue of liability. If the jury returned a verdict in favor of plaintiffs, the Court proposed that a trial on damages would immediately commence before the same jury. Upon proposing that procedure, the Court ordered the parties to show cause why such procedure would not be an appropriate manner in which to proceed with trial.

Plaintiffs opposed the Court's proposal. See Filing No. 520. Plaintiffs noted that "bifurcation must be undertaken in such a way that the second phase of a trial, governing damages, becomes little more than an application of the formula found by the jury in the first phase." Filing No. 520

at 1-2. Plaintiffs argued that the "interwoven nature" of the evidence in this case "makes bifurcation of liability from damages unworkable," and further noted that "proof of liability and damages are largely inseparable." Filing No. 520 at 3, ¶¶ 7-8. At that time, plaintiffs argued that "the initial phase of the trial, including the determination of liability and class-wide damages should not be bifurcated." *Id.* at 5, ¶ 17.

The Court subsequently decided not to bifurcate the trial. As such, plaintiffs were required to prove, at the initial trial of this case, the existence and amount of damages to the class, or a formula from which individual damages could later be calculated. Plaintiffs failed to make such a showing at trial. Absent a finding from the jury on the class-wide damages, plaintiffs now seek to determine individual damages in a subsequent claims procedure, the formula for which has not been established by plaintiffs, and none can be developed from the jury's verdict.

Dr. Taylor testified that in his opinion, the damages to the cash market as a whole was an amount slightly in excess of $2.1 billion. He had prepared an exhibit (Exhibit 1221), reflecting how he arrived at that figure. However, that exhibit is of no help in devising a formula by which damage to individual class members can be calculated. The jury obviously disagreed with his calculations, returning a verdict of $1,281,690.00.[2] The manner in which the jury derived that dollar amount is currently unknown, and it would be impermissible for the Court to speculate as to the basis upon which the jury found that amount to be the correct calculation of damages. The jury also found that the defendant's use of captive supply did not have an equal percentage effect on the cash market price for fed cattle for each year during the class period. This finding, too, is problematic for plaintiffs, as they

[2] The Court has previously declined to enter judgment on the jury's finding of damages to the market in the amount of $1,281,690,000. See Filing No. 675.

essentially failed to establish a viable formula for computing damages for individual members of the class. As such, the Court is left without any formula or method from which a magistrate judge or special master could calculate damages on an individual basis in a future claims procedure.

The Court recognizes that the jury was never asked to quantify damages suffered solely by class members. Rather, the Court framed a question on the verdict form such that the jury was asked to determine damages to the entire cash market during the class period. Such question was posed to the jury primarily because plaintiffs' evidence did not permit a finding of any other sort. Had the jury been asked to quantify the damages suffered solely by class members, there is no doubt that the evidence adduced at trial would have been insufficient to support any such finding, as plaintiffs' experts failed to develop a model from which such conclusion could be drawn.[3] The plaintiffs have failed to carry their burden on the issue of damages to members of the class.

For the aforementioned reasons, the Court finds that plaintiffs failed to present evidence at trial to sustain their burden with respect to both liability and damages. For the foregoing reasons, the Court will grant defendant's motion for judgment as a matter of law.

Also before the Court is a motion for pro hac vice admission filed by Roger A. McEowen (Filing No. 679); and a motion to submit an amici brief (Filing No. 680) which was included with the motion and affidavit. After review, the Court finds said motions should be denied. A separate order will be entered in accordance with this memorandum opinion.

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[3] The Court notes that IBP's average cattle cost is virtually identical to the USDA average market price, indicating that the defendant paid the same amount for its cattle as the other market participants during the class period. See Filing No. 1213A. Plaintiffs contended that IBP was the price leader, but the evidence of both parties is inconsistent with a finding of such price leadership.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil No. 96-A-1103-N

HENRY LEE PICKETT, *et al.*,
Plaintiffs,

v.

TYSON FRESH MEATS, INC.,
Defendant.

COURT'S CHARGE TO THE JURY

INSTRUCTION NO. 1

Now that you have heard the evidence and the arguments of counsel have been made, it is my duty to inform you of the legal principles and considerations you are to use in arriving at a proper verdict.

In accordance with the oath which each of you took when you were selected as jurors to try this case, it is your duty to determine the disputed issues of fact in this case from the evidence produced and seek thereby to reach a verdict which shall speak the truth of the case and thereby do justice between the parties hereto, uninfluenced by sympathy, favor, affection or prejudice for or against any party. It is your duty to receive and accept as correct the law as given you in this charge, and you are not privileged to entertain an opinion as to the law or what the law should be which conflicts in any respect with the law as stated in this charge. However, I have not attempted to embody all the law applicable to this case in any one of the instructions contained in this charge, and

therefore, you must consider the charge in its entirety, giving due weight to each instruction, and construing each instruction in the light of, and in harmony with, the other instructions, and so apply the principles set forth to all of the evidence received during the trial.

INSTRUCTION NO. 2

At the outset, I urge you to make every effort to reach an agreement in your deliberations. Inconclusive trials are not desirable. A common understanding among competent and intelligent people ought to be possible.

However, this observation must not be construed by any juror as a suggestion of the abandonment of an opinion held understandably and earnestly, just for the sake of agreement. The Court must never coerce agreements by jurors. It is appropriate to suggest that if you should find yourselves in apparent disagreement, each of you should carefully reexamine your opinions before assuming a position of dissent.

I should give you one preliminary word of caution. It is seldom wise or beneficial for a juror to make an emphatic expression of his or her opinion of the case, or to announce a determination to stand for a certain verdict, immediately upon entering the jury room at the beginning of deliberations. The reason for this is obvious. We are all human, and it is difficult to recede from a position once it has been firmly and definitely stated.

INSTRUCTION NO. 3

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you should not be concerned with those terms since the law makes no distinction between the weight to be given to direct and circumstantial evidence.

INSTRUCTION NO. 4

During the trial I have ruled on objections to certain evidence. You must not concern yourselves with the reason for such rulings since they are controlled by rules of law.

You must not speculate or form or act upon any opinion as to how a witness might have testified in answer to questions which I have rejected during the trial, or upon any subject matter to which I have forbidden inquiry.

In coming to any conclusion in this case, you must be governed by the evidence before you and by the evidence alone. You have no right to indulge in speculation, conjecture or inference not supported by the evidence.

The evidence from which you are to find the facts consists of the following: (1) the testimony of the witnesses; and (2) documents and other things received as exhibits.

The following things are not evidence: (1) statements, comments, questions and arguments by lawyers for the parties; (2) objections to questions; (3) any testimony which I have stricken or which I have told you to disregard; and (4) anything you may have seen or heard about this case outside the courtroom.

INSTRUCTION NO. 5

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In determining the weight to be given to the testimony of the witnesses, you should take into consideration their interest in the result of the suit, if any appears, their conduct and demeanor while testifying, their apparent fairness or bias, their relationship to the parties, if any appears, their opportunities for seeing or knowing and remembering the things about which they testified, the reasonableness or unreasonableness of the testimony given by them, any previous statement or conduct of the witness that is consistent or inconsistent with the testimony of the witness at this trial, and all of the evidence, facts, and circumstances proved which tend to corroborate or contradict such evidence, if any appear. You are not bound to take the testimony of any witness as true, and should not do so if you are satisfied from all the facts and circumstances proved at the trial that such witness is mistaken in the matter testified to, or that for any other reason appearing in the evidence, the testimony is untrue or unreliable.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you must consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

The fact that one side may have used a greater number of witnesses or presented a greater quantity of evidence should not affect your decision. Rather, you should determine which witness or witnesses, and which evidence appears accurate and trustworthy. It is the weight of the evidence that counts—not the number of witnesses.

The testimony of a single witness which produces in your minds belief in the likelihood of truth is sufficient for proof of

any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary if, after consideration of all of the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

INSTRUCTION NO. 6

During the testimony of Mr. Callicrate, I instructed you to disregard a portion of his testimony because I found it was not true. You should consider his testimony on other subjects with caution and weigh it with great care. You may disregard his testimony in whole or in part, except insofar as it may have been corroborated by other credible evidence. Remember, that you, as jurors, are the sole judges of the truthfulness of the witnesses and the weight their testimony deserves.

INSTRUCTION NO. 7

A witness who has special knowledge, skill, experience, training, or education in a particular area may testify as an expert in that area. You determine what weight, if any, to give to an expert's testimony just as you do with the testimony of any other witness. You should consider the expert's credibility as a witness, the expert's qualifications as an expert, the sources of the expert's information, and the reasons given for any opinions expressed by the expert.

INSTRUCTION NO. 8

During the trial, certain testimony was presented to you by way of deposition, consisting of sworn and recorded answers to questions asked of the witnesses by attorneys for the parties in the case. Such testimony is under oath and is entitled to the same fair and impartial consideration you give other testimony. In other words, you should consider the deposition testimony just as you would have had the witness been present, and had testified from the witness stand.

INSTRUCTION NO. 9

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the records and other documents which are in evidence in this case. Some of these charts and summaries display the contents of voluminous writings which cannot be conveniently examined in court. These summaries are evidence and will be available to you in the jury room. However, other charts and summaries, which were referred to as demonstrative exhibits, were used merely to illustrate a point. These charts and summaries are not in and of themselves evidence or proof of any facts. If such charts and summaries do not correctly reflect facts or figures shown by the evidence in this case, you should disregard them.

INSTRUCTION NO. 10

It is appropriate at this time to define several terms which will recur from time to time in this charge.

By a "preponderance of the evidence" is meant the greater weight of credible evidence. Any party who has the burden of proving a claim must do so by the greater weight of the evidence. The greater weight of the evidence means evidence sufficient to make a claim more likely true than not true.

The greater weight of the evidence is not determined by the greater number of witnesses testifying in relation to the facts and circumstances, but that amount of evidence which on the whole, when fully, fairly and impartially considered, makes the stronger impression on your mind and is more convincing as to its truth when weighed against the evidence in opposition thereto. If the evidence is equally balanced, a preponderance is not established.

"Proximate cause"—a proximate cause is one that in a natural course, in a continuous sequence, unbroken by any intervening cause, produces the injury, and without which the

injury would not have occurred. This is not to say that the law recognizes only one proximate cause of an injury or damage, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause.

"Cash Market"—As used in these instructions, the term cash market refers to cattle transactions where the price or base price was negotiated at the time of the sale, and where the cattle were delivered to the defendant within seven days of the sale.

"Captive Supply"—As used in these instructions, captive supply refers to cattle purchased by a packer through marketing agreements or alliances, formula sales, forward contracts, or joint ventures, and which do not constitute cash market transactions.

"Class period" shall mean the period of time between February 1, 1994 and October 31, 2002.

INSTRUCTION NO. 11

The parties to this case consist of a class of cattle producers with an ownership interest in cattle, which cattle were sold to defendant IBP exclusively on the cash market during the class period. The size of this class and the identity of some of its members are currently unknown. For purposes of this lawsuit, the class is represented by Henry Lee Pickett, Mike Callicrate, Pat Goggins, Johnny Smith, Christopher J. Abbott, and W.J. Rothwell Ranch Co.

The defendant in this case is IBP, Inc., now known as Tyson Fresh Meats, Inc. IBP is a beef packer that buys fed cattle and produces beef and various cattle byproducts. Tyson purchased IBP in 2001. In these instructions, the plaintiffs will be referred to as "plaintiffs" and the defendant will be referred to as "IBP" or as "defendant."

W.J. Rothwell Ranch Company and IBP are corporations. The fact that corporations are involved as parties must not affect your decision in any way. A corporation and all other persons stand equal before the law and must be dealt with as equals in a court of justice. When a corporation is involved, of course, it may act only through people as its employees; and, in general, a corporation is responsible under the law for any of the acts and statements of its employees that are made within the scope of their duties as employees of the company.

INSTRUCTION NO. 12

This case involves claims that the defendant violated the Packers and Stockyards Act of 1921. This Act, as applicable to this case, provides that it is unlawful for a packer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device, to buy or otherwise receive from any person any article for the purpose or with the effect of controlling or manipulating prices, or to engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices. The Act does not prohibit the use of marketing agreements or alliances, forward contracts, joint ventures, or formula purchases of fed cattle unless such use violates any of the above provisions of the Act.

This case does not involve a claim that there was any conspiracy involving the defendant and any other packers or producers, nor does it involve any claim that the marketing agreements or alliances, forward contracts, joint ventures, or formula purchases of cattle gave any undue or unreasonable preference or advantage to any producer.

IBP denies that it has violated the Packers and Stockyards Act by using forward contracts, marketing agreements, and any other form of captive supply. Although IBP concedes that it uses captive supply, it contends that it does so for legitimate business reasons and that these contracts benefit packers, feedyards, cattle owners and consumers. IBP claims that prices in

the cash market are determined by the forces of supply and demand. According to IBP, its use of captive supply does not cause the cash market prices to be lower.

You should understand, members of the jury, that this instruction constitutes only a brief summary of the claims made by the respective parties in this case and should not be taken or considered by you as evidence in this case.

INSTRUCTION NO. 13

In order to prevail on their claims, plaintiffs must prove each of the following elements by a preponderance of the evidence:

1) That defendant's use of captive supply violated the Packers and Stockyards Act;

2) That defendant's use of captive supply proximately caused the cash market price to be lower; and

3) That each and every member of the plaintiff class was injured by IBP's use of captive supply.

I will now discuss these elements in greater detail.

INSTRUCTION NO. 14

The Packers and Stockyards Act forbids a packer from engaging in any "unfair practice or device." In the context of this case, "unfair" is a legal term and has a very specific meaning. The Packers and Stockyards Act is one of the nation's antitrust laws. One purpose of these laws is to preserve our system of free and open competition.

You must interpret the term "unfair practice or device" using what is called a "rule of reason." Under that rule, conduct constitutes an unfair practice or device only if it unreasonably suppresses, restrains or destroys competition.

To prove that IBP violated the Packers and Stockyards Act, plaintiffs must prove by a preponderance of the evidence that

(1) IBP's conduct had an anticompetitive effect on the relevant market, and (2) the conduct had no justification or competitive benefit.

INSTRUCTION NO. 15

In order to prove that IBP's conduct had an anticompetitive effect on the market, the plaintiffs must prove either that competition has actually suffered or that there is a potential for genuine adverse effects on competition due to IBP's conduct.

To prove potential adverse effects on competition by IBP's conduct, the plaintiffs must define the relevant product and geographic markets and establish that IBP possessed sufficient market power to adversely affect competition in those markets. In this case, plaintiffs allege that the relevant product market is the market for fed cattle, and that the relevant geographic market is the entire United States.

Market power includes the ability to control price, exclude competition or restrict output. In determining whether IBP had market power, you should consider IBP's share or portion of the overall market; whether there are any barriers to entry by new firms in the market; and evidence concerning the intensity of competition within the market for fed cattle. If IBP does not have market power, IBP's conduct cannot have an anticompetitive effect on the relevant market. If IBP has market power in the relevant market, then you must determine whether the conduct in question—the use of captive supply—had an anticompetitive effect in the cash market.

INSTRUCTION NO. 16

To prove that IBP's conduct constituted an unfair practice or device, plaintiffs must also prove that IBP's conduct did not have any legitimate business justification or competitive benefit.

IBP has asserted that captive supply arrangements have legitimate business justifications and benefits for competition. IBP has introduced evidence regarding its claimed business justifications and/or competitive benefits. You must determine whether such justifications or benefits actually exist. If the beneficial effects on competition outweigh the harmful effects on competition, or if the net effect on competition is only slight or insubstantial, you may find that IBP's conduct has competitive benefits. If you believe that IBP has legitimate business justifications for using captive supply, you may indicate as such on the verdict form.

INSTRUCTION NO. 17

If you find that plaintiffs have proven a violation of the Act, the second element plaintiffs must prove in order to prevail in this case is that IBP's use of captive supply proximately caused the cash market price to be lower than it otherwise would have been. The mere fact that captive supply shipments may be associated with declines in the cash market price does not prove or disprove that one proximately causes the other.

INSTRUCTION NO. 18

The third element plaintiffs must prove in order to prevail in this case is that each and every member of the plaintiff class was injured by IBP's use of captive supply. Plaintiffs contend that, in any given week, the effect on the cash market price of IBP's use of captive supply was the same dollar amount (per hundredweight) in all parts of the United States. The defendant argues that, even if its conduct had an effect on the cash market price, such effect would not be uniform in all parts of the United States.

INSTRUCTION NO. 19

If you find that the defendant violated the Packers and Stockyards Act and that such violation proximately caused damage to each and every member of the class, then you will

be asked to determine the amount of damages which you find were proximately caused to the cash market for live cattle by the defendant's violation of the Packers and Stockyards Act through the use of captive supply. In this regard you are to consider only the class period. You will also be asked to determine the percent by which defendant's actions damaged the cash market as a whole during the class period.

To establish that IBP's use of captive supply caused an injury to each and every member of the plaintiff class, plaintiffs need not prove such injury with exactitude, but must establish that the members of the class were injured in some measurable amount. Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture.

The plaintiffs are also seeking injunctive relief in this case. That is a matter for the Court to decide and you are not to concern yourselves with that issue.

INSTRUCTION NO. 20

You must not take into consideration any attorney's fees or court costs in answering the interrogatories contained on the verdict form. The matter of attorney's fees and court costs is to be decided by the Court.

INSTRUCTION NO. 21

In the trial of this case and in this charge, I have in no way attempted to express my opinion as to who should prevail upon the issues submitted to you. You must not construe any statement, action, or ruling on my part in the trial of this case as an indication of any opinion on my part respecting the proper course of your verdict. During the course of a trial, I occasionally ask questions of a witness in order to bring out facts not fully covered in the testimony. Do not assume that I hold any opinion on the matters to which the questions related.

So regardless of what I may have chosen to say, I must admonish you that you are the sole judges of the facts, and your verdict must respond to your own conclusions from the evidence.

INSTRUCTION NO. 22

Upon your retirement to the jury room, first select one of your number to be foreperson to preside over your deliberations and who will sign the form of verdict. You will then begin your study and deliberations of the case.

In arriving at your verdict, I admonish you that it must be unanimous. Short of unanimity, you cannot consider that you have reached any verdict.

If it becomes necessary during your deliberations to communicate with the Court, write out your note or question on a piece of paper and have the Court Security Officer deliver it to me. I will consult with counsel for the parties and I will respond to your question as promptly as possible. Bear in mind you are not to reveal to me or to anyone else how the jury stands, numerically or otherwise, until you have reached a unanimous verdict.

Upon arriving at your verdict and completion of the form of verdict by the foreperson, you will have concluded your task and you should notify me by writing a note and having the Court Security Officer deliver it to me.

As the Judge presiding over the trial, I shall be available throughout the remainder of the day and until your verdict is returned, and I shall receive it promptly upon its return.

If you do not arrive at your verdict during the present court day, you will continue deliberations until you do, with allowance of time for meals and with an intermission between 5 p.m. today and 9 a.m. tomorrow morning. During the time allotted for meals and night's rest, you will be permitted to separate, but you should return promptly at the time set for

continuation of your deliberations. During the periods of your separation, you should keep in mind the admonitions of the Court concerning your conduct while separated.

A verdict form has been prepared and will be taken with you when you retire for your deliberations. This form will be adequate for the expression of any verdict you may properly agree upon. If you find for the plaintiff, you will use that portion of the form reflecting your verdict for the plaintiffs, and your foreperson will insert in words and figures in the blank space reserved for that purpose the amount of damages found in favor of plaintiffs. Your foreperson only will date and sign the verdict.

If you find for the defendant, you will use that portion of the form reflecting your verdict for the defendant and your foreperson will date and sign that form of verdict.

Remember, at all times your verdict must be unanimous.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action 96-A-1103-N

HENRY LEE PICKETT, *et al.*,
Plaintiffs,

v.

TYSON FRESH MEATS, INC.,
Defendant.

MEMBERS OF THE JURY:

It appears that your specific question relates to the term "legitimate" as it appears in the third question. As used in that question, it means a valid business justification or reason in contrast to a pretextual justification or reason. It does not mean legal or in compliance with the Packers and Stockyards Act.

As to the second question in this note, all questions have to be answered individually and your finding must be based on a preponderance of the evidence with respect to each question. Again, you can consider all of the evidence in determining whether a preponderance has been met with respect to each individual question.

DATED this 12th day of February, 2004.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM Senior Judge
United States District Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Filed Feb. 17, 2004]

Civil No. 96-A-1103-N

HENRY LEE PICKETT, *et al.*,
Plaintiffs,

v.

TYSON FRESH MEATS, INC.,
Defendant.

VERDICT FORM

Do you find, by a preponderance of the evidence:

1. That there is a nationwide market for fed cattle?

   √ Yes __ No

2. That the defendant's use of captive supply had an anticompetitive effect on the cash market for fed cattle?

   √ Yes __ No

3. That the defendant lacked a legitimate business reason or competitive justification for using captive supply?

   √ Yes __ No

4. That the defendant's use of captive supply proximately caused the cash market price to be lower than it otherwise would have been?

   √ Yes __ No

5. That the defendant's use of captive supply injured each and every member of the plaintiffs' class?

√ Yes __ No

If you have answered "yes" to each of the foregoing questions, then you should proceed to questions number 6 and 7. If you have answered "no" to any one or more of the foregoing questions, you may consider your deliberations completed and your foreperson should sign and date this verdict form.

6. What amount, if any, do you find that defendant's use of captive supply damaged the cash market price of fed cattle sold to IBP during the period from February 1, 1994, through October 31, 2002?

$1,281,690,000.00

7. Did the defendant's use of captive supply depress the cash market price for fed cattle purchased by IBP by an equal percentage for each year of the class period?

If your answer is yes, by what percent?

__%

DATED this 17th day of February, 2004.

/s/ [Illegible]
FOREPERSON

(2)

Supreme Court, U.S.
FILED
FEB 21 2006
OFFICE OF THE CLERK

No. 05-864

IN THE

Supreme Court of the United States

HENRY LEE "LEROY" PICKETT, *et al.*,
Petitioners

v.

TYSON FRESH MEATS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Circuit erred in holding that the petitioners in this case failed to present sufficient evidence for a jury to find a violation of § 202 (a) or (e) of the Packers and Stockyards Act, 7 U.S.C. § 192 (a), (e).

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Tyson Foods, Inc. (NYSE: TSN) owns 100 percent of the stock of respondent Tyson Fresh Meats, Inc.

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STATUTES

7 U.S.C. § 192 1

§ 213(a) 13

Respondent Tyson Fresh Meats, Inc. (formerly known as IBP, inc., and referred to herein as "Tyson"), hereby opposes the petition for a writ of certiorari in this case.

STATUTORY PROVISION INVOLVED

The petition cites section 202 of the Packers and Stockyards Act (codified at 7 U.S.C. § 192) as the statutory provision relevant to this Court's review. However, as the court of appeals' decision in this case makes clear, petitioners asserted claims only under subsections (a) and (e) of section 202. See Pet. App. 10a. In addition, petitioners' claims under subsection (a) concerned only allegedly "unfair" practices or devices and petitioners' claims under subsection (e) concerned only alleged price manipulation or control. See *id.* ("The dispute is over what is an 'unfair' practice and what constitutes 'any act for the purpose or with the effect of manipulating or controlling prices.'"). Accordingly, the relevant portions of 7 U.S.C. § 192 provide:

> It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:
>
> (a) Engage in or use any unfair, ... practice or device; or
>
> ....
>
> (e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices ....

7 U.S.C. § 192(a), (e).

INTRODUCTION

This case is about the sufficiency of the evidence, which is inherently unworthy of review by this Court. The district

court granted respondent judgment as a matter of law because it concluded that petitioners failed to present sufficient evidence on several elements of their claim of liability. See Pet. App. 3a-34a. The district court also concluded that petitioners failed to present sufficient evidence from which a reasonable jury could determine petitioners' damages. See *id.* at 34a-37a. In a factually detailed opinion, the court of appeals affirmed based on the lack of evidence with regard to one element of petitioners' case on liability, without addressing the district court's other independent and sufficient grounds for dismissal based on petitioners' failures of proof. See *id.* at 10a-27a.

Petitioners assert that certiorari should be granted because the court of appeals' decision creates a lopsided conflict in the federal circuits on one legal issue and adds to a division of authority on a different issue. These alleged divisions of authority are not real, but even if the petition presented a conflict on an issue of law, certiorari still should be denied for several reasons. First, petitioners' argument on the state of the law in the Eleventh Circuit is directly contrary to the arguments petitioners presented to that court. Second, given the about-face in petitioners' arguments, it is unsurprising that the court of appeals' decision does not discuss several of the principal points raised in the petition. Thus, this Court lacks the benefit of the Eleventh Circuit's analysis of the issues. Third, the questions presented in the petition are logically inconsistent, as petitioners simultaneously argue that their claim does not raise the question whether Tyson's conduct caused potential or actual anticompetitive harm, and that the Eleventh Circuit erred in failing to require a weighing of the anticompetitive harms and beneficial effects of the conduct in question. Fourth, as the district court's opinion makes clear, petitioners' case would fail regardless of the legal standard applied to the issues raised in the petition. Finally, it is clear that the district court and court of appeals correctly decided the case.

STATEMENT OF THE CASE

1. Petitioners, a small group of cattle producers, filed a class action against Tyson, a beef packer. As a packer, Tyson purchases and processes fed cattle, which are cattle that have been raised specifically for human consumption. Pet. App. 2a. Fed cattle are typically sent to a "feed yard" for fattening before slaughter. *Id.* Feed yards keep cattle in pens, with 50 to 200 head in each pen. *Id.* at 3a. Packers buy fed cattle, slaughter them, disassemble the carcasses, and sell the resulting meat and by-products to customers. *Id.*

One method of purchasing cattle is on the "cash market." In a cash market sale, a packer-buyer bids on entire pens of cattle, rather than purchasing individual or small groups of animals. Pet. App. 3a-4a. Packers send buyers to feed yards around the country to inspect and bid on pens of cattle that are ready to be sold. *Id.* at 4a. The cattle producer shows the cattle and often haggles with the packer-buyer over the packer's bid. *Id.* Feed yards and producers are free to accept or reject a bid, and often consider comparative bids made on other pens around the country. *Id.* Once an agreement is reached on price, the cattle are typically delivered to the packing plant within seven days. *Id.*

Another method of purchasing cattle involves the use of marketing agreements or forward contracts.[1] Marketing agreements were developed by cattle producers to avoid the "time and hassle" of selling cattle to multiple bidding packers each week on the cash market. Pet. App. 4a. Under a marketing agreement, a feed yard will inform the packer two weeks in advance that the producer intends to deliver a certain number of cattle for slaughter. Once the producer picks the

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[1] Petitioners refer to forward contracts and marketing agreements pejoratively as "captive supply." However, as both the district court and the Eleventh Circuit found, that title is a "misnomer." Pet. App. 6a n.3, 31a n.1. These are arms-length transactions preferred by many cattle producers.

week he will deliver his cattle, the packer picks the exact date of delivery. *Id.* at 4a-5a. The price paid for the cattle is calculated using the prices paid for cash market cattle in the same geographic area, with adjustments for individual cattle based on the quality or yield of each carcass. *Id.* at 5a.

Petitioners' lawsuit alleged that Tyson and various cattle producers had voluntarily entered into these contracts whereby Tyson would purchase fed cattle that the producers wished to sell. Petitioners further alleged that Tyson's use of these contracts violates section 202 (a) and (e) of the Packers and Stockyards Act ("PSA" or the "Act").

2. Petitioners filed suit on July 11, 1996 in the United States District Court for the Middle District of Alabama. Petitioners alleged that Tyson's use of procurement contracts had the effect of reducing the prices Tyson paid to cattle producers who chose not to sell under a contract, but rather chose to sell their cattle in the cash market. Petitioners sought compensatory damages, punitive damages, and an injunction prohibiting Tyson's use of such contracts.

Petitioners' class was defined as cattle producers who sold cattle to IBP *exclusively on a cash-market basis* during the class period. Pet. App. 5a n.2. Thus, any cattle producer who had elected to sell cattle to Tyson under a forward contract or marketing agreement was excluded from the class. *Id.*

Trial began on January 12, 2004 and lasted for approximately four weeks. Although the district court declined to take the case away from the jury, it observed that petitioners had presented "a very thin case." Pet. App. 7a. Moreover, the district court noted that petitioners' primary expert's testimony was illogical. *Id.* at 11a n.7 (noting the district court's statement that the theories and conclusions

offered by petitioners' principal economic expert were "'nuts'").[2]

The case was submitted to the jury on February 11, 2004, pursuant to a series of special interrogatories. In instructing the jury, the district court concluded that petitioners had offered no proof regarding the size or composition of the class and, therefore, no proof as to the number or value of cattle sold to Tyson by class members during the class period. Pet. App. 44a-45a, 48a-49a. In the absence of this critical evidence from which injury to the class and the amount of damages might be determined,[3] the district court concluded that it had no basis on which to ask the jury to determine an award of aggregate class damages. *Id.* Instead, the verdict form asked the jury whether the challenged conduct affected class members by a uniform percentage amount. *Id.* at 54a. A special interrogatory asked the jury to render an *advisory* verdict on the amount of damages, if any, on *all cash market sales* (including sales by non-class members) to Tyson during the class period. *Id.*; see also *id.* at 48a-49a.

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[2] In light of the flaws in petitioners' expert evidence and the district court's critical statements about the logic of their economic theories, the Eleventh Circuit noted that this case may present a significant issue under *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Pet. App 11a n.7. However, in light of its affirmance on other grounds, the court of appeals did not analyze Tyson's *Daubert* arguments. *See id.*

[3] To prevail, petitioners were required to prove both that each and every member of the class was injured and the amount of damages to the class. "Fact of damage"—or proof of actual injury from the challenged conduct—is an element of liability under the antitrust laws and the PSA separate from the amount of damages. *See Alan's of Atlanta, Inc.* v. *Minolta Corp.*, 903 F.2d 1414, 1426 (11th Cir. 1990); *McClure* v. *Undersea Indus., Inc.*, 671 F.2d 1287, 1289 (11th Cir. 1982); *Alabama* v. *Blue Bird Body Co.*, 573 F.2d 309, 317 (5th Cir. 1978); *Pickett* v. *IBP, inc.*, 182 F.R.D. 647, 658 (M.D. Ala. 1998). The requirement of proof on the amount of damages is subject to a more lenient standard, but proof of some impact or injury to each member of the class must be made to a "fair degree of certainty." *Blue Bird Body Co.*, 573 F.2d at 317.

On February 17, 2004, the jury returned a verdict on liability in favor of petitioners. Pet. App. 53a-54a. The jury also returned an advisory verdict estimating that the effect of Tyson's use of forward contracts and marketing agreements on *all* cash market sellers to Tyson was $1,281,690,000—thus rejecting the only damage calculation put forward by petitioners' economic expert (which had calculated the effect on all cash sellers at $2.1 billion). *Id.* at 54a. The jury found that, contrary to petitioners' assertions, the challenged conduct had not affected class members by a uniform percentage. *Id.*

The district court granted Tyson's motion for judgment as a matter of law on April 23, 2004. Pet. App. 28a-37a. It ruled that petitioners had failed to present sufficient evidence for a reasonable jury to find for petitioners on either liability or damages. *Id.* at 37a. First, the district court held that no reasonable jury could have concluded that Tyson lacked a legitimate business justification for its use of marketing agreements and forward contracts. *Id.* at 31a-34a. Second, the district court found no evidence upon which a reasonable jury could conclude that each member of petitioners' class suffered an injury. *Id.* at 34a-35a. Third, the district court held that petitioners failed to prove aggregate damages to the class or a formula from which damages for individual class members could be calculated. *Id.* at 35a-37a.

3. Petitioners appealed to the Eleventh Circuit, which unanimously affirmed the district court's judgment on August 16, 2005. Pet. App. 1a-27a. Petitioners argued that the jury's finding that Tyson had no competitive justification for using marketing agreements was reasonable because there was sufficient evidence to support a finding that Tyson's proffered justifications were pretextual. *Id.* at 14a. The Eleventh Circuit meticulously analyzed the evidence relating to each of Tyson's proffered competitive justifications. *Id.* at 14a-24a. It concluded that petitioners failed to present any evidence from which a reasonable jury could find that Tyson lacked

competitive justifications for using marketing agreements. *Id.* at 25a. The Eleventh Circuit found the evidence "undisputed" that marketing agreements provide competitive benefits. *Id.* The Eleventh Circuit also noted that the jury may have been swayed by more than the actual evidence presented, namely, by petitioners' appeal to the historical independence of cattle farmers. *Id.* The court of appeals concluded that cattle producers like petitioners are entitled to their preference for selling cattle only on the cash market, but are not entitled to force that preference on other producers or packers who wish to find innovative and efficient methods of buying and selling cattle. *Id.* at 27a.

On August 19, 2005, three days after issuing its opinion on the merits of petitioners' appeal, the Eleventh Circuit decided petitioners' companion appeal of the district court's order assessing costs against petitioners. Opp. App. 1a-4a. In their costs appeal, petitioners argued that Tyson was not a "prevailing party" entitled to costs and, even if it were, the district court abused its discretion in awarding costs to Tyson because the legal claims raised in the case were unsettled and the courts' rulings on Tyson's motion for judgment were close calls. *Id.* at 2a-3a. The Eleventh Circuit rejected both of these arguments. *Id.* at 3a-4a. First, it concluded that Tyson was the "prevailing party" because petitioners "lost every aspect of the case and Tyson prevailed on it." *Id.* at 3a. Second, in holding that the district court did not abuse its discretion in awarding costs, it found: "[T]his case was not a close and difficult one.... The legal issues were not particularly novel or difficult.... [and] the case was not especially complicated." *Id.* at 4a.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals conflicts with no decision of any other court of appeals and otherwise involves little more than the factbound determination that petitioners failed to prove their case, which is plainly unworthy of this

Court's review. Moreover, petitioners attempt to present an issue that they never presented to the court of appeals and, not surprisingly, the court of appeals did not decide. Thus, certiorari plainly should be denied.

I. THE ELEVENTH CIRCUIT HAS NOT ABANDONED THE RULE OF REASON AND PETITIONERS HAVE WAIVED ANY ARGUMENT TO THE CONTRARY.

Petitioners claim that this Court's review is warranted because the Eleventh Circuit has abandoned the "rule of reason" analysis applied under various antitrust statutes and has thereby departed from the law of this Court and every other court of appeals. See Pet. 7-11. Petitioners summarize their allegation that the Eleventh Circuit is the "lone outlier" in applying the rule of reason as follows: "[e]very other circuit readily accepts that an analysis under the rule of reason requires the court to balance the procompetitive benefits of a challenged practice against the anticompetitive harm caused by the practice." *Id.* at 9.

Petitioners' argument has been waived and in any event there is no holding below that abandons the rule of reason.

First, petitioners have waived their argument that the Eleventh Circuit has "abandoned" the rule of reason in this case. Petitioners did not present this argument to the court of appeals. To the contrary, petitioners' brief before the Eleventh Circuit argued that the trial court erred by applying a rule of reason analysis to their PSA claims. See Opp. App. 10a-12a. In the alternative, petitioners asserted to the court of appeals that its precedents applying the rule of reason are in harmony with those of the other federal circuits in requiring a balancing of the procompetitive benefits and anticompetitive harm of a challenged practice. See *id.* at 12a-16a (stating that, under Eleventh Circuit law, "[i]t is also evident that a weighing of the anti-competitive and pro-competitive benefits should take place.") (citing *Consultants & Designers, Inc.* v.

Butler Serv. Group, 720 F.2d 1553, 1562 (11th Cir. 1983) and *Graphic Prods. Distribs.* v. *ITEK Corp.*, 717 F.2d 1560, 1573 & n.24 (11th Cir. 1983)).

Under the doctrine of waiver, petitioners cannot assert an argument in this Court that they failed to raise previously, and indeed, is directly contrary to the argument raised below. See, *e.g.*, *Cooper Indus., Inc.* v. *Avaiall Servs., Inc.*, 543 U.S. 157, 168-69 (2004) ("'We ordinarily do not decide in the first instance issues not decided below.'") (quoting *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (per curiam)); *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived."); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38 (1989) ("We decline to address this argument because respondent failed to raise it below ...."); *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984).

Second, petitioners' assertion to the Eleventh Circuit that its law is in harmony with the other federal circuits is correct. Contrary to petitioners' argument before this Court, the Eleventh Circuit plainly has not abandoned the concept that the rule of reason involves a weighing of the relative anticompetitive harms and procompetitive benefits of the conduct in question. See, *e.g.*, *Consultants & Designers, Inc.* v. *Butler Serv. Group*, 720 F.2d 1553, 1562 (11th Cir. 1983); *Graphic Prods. Distribs.* v. *ITEK Corp.*, 717 F.2d 1560, 1573 & n.24 (11th Cir. 1982); *All Care Nursing Serv., Inc.* v. *High Tech Staffing Servs., Inc.*, 135 F.3d 740, 749 (11th Cir. 1998) ("The rule of reason requires 'the factfinder [to weigh] all of the circumstances of the case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'") (alteration in original); *DeLong Equip. Co.* v. *Washington Mills Abrasive Co.*, 887 F.2d 1499, 1507 (1989) (same). In fact, the district court specifically instructed the jury to conduct the weighing of harms and benefits that petitioners demand. See Pet. App. 48a ("If the beneficial effects on competition [of marketing agreements]

outweigh the harmful effects on competition, or if the net effect on competition is only slight or insubstantial, you may find that IBP's conduct has competitive benefits.").

Moreover, petitioners' arguments to this Court contain an inherent inconsistency that renders the case an unsuitable vehicle for review. As noted below, the petition asserts that, under the PSA, petitioners are not required to prove that the conduct in question caused any anticompetitive harm. See Pet. 15-19. However, petitioners also argue that the Eleventh Circuit has departed from the established course of the law in failing to *require* the district court to undertake a balancing of anticompetitive harm and procompetitive benefits in this case. See *id.* at 7-11. They cannot have it both ways.

II. THE CIRCUITS ARE NOT DIVIDED ON THE STANDARDS GOVERNING PETITIONERS' PSA CLAIM.

Likewise, petitioners are incorrect in asserting that there is a "longstanding" split among the courts of appeals concerning whether section 202(a) of the PSA requires proof of an injury or likelihood of injury that is competitive in nature. See Pet. 12. Petitioners contend that the Seventh and Eleventh Circuits require plaintiffs who bring a claim under section 202(a) to prove an actual or likely harm to competition, but that the Ninth and Tenth Circuits do not require such a showing. This purported split is illusory. In asserting that the courts of appeals are divided, petitioners fail to address all of the relevant cases and also fail to distinguish the separate claims available under section 202(a) and the separate subsections of the PSA.

In the decision below, the Eleventh Circuit stated that a claimant alleging that conduct is "unfair" under section 202(a) of the PSA must show an "adverse effect on competition." Pet. App. 12a. The Eleventh Circuit recently reached the same conclusion in *London* v. *Fieldale Farms, Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005). In *London*, the

court of appeals stated "in order to succeed on a claim under the PSA, a plaintiff must show that the defendant's unfair, discriminatory or deceptive practice adversely affects or is likely to adversely affect competition." *Id.* This Court recently denied the petition in *London*. 126 S. Ct. 752 (2005)

This holding is in harmony with the decisions of the other federal circuits that have addressed the application of the "unfairness" claim provided in section 202(a):

Fourth Circuit: The Fourth Circuit has not yet issued a published opinion on the question whether section 202(a) requires a showing of actual or likely competitive injury. However, that court has addressed that exact question and concluded that competitive injury is required in an unpublished disposition. *Philson* v. *Goldsboro Milling Co.*, 164 F.3d 625 (4th Cir. 1998) (unpublished table decision), *available at* 1998 WL 709324, at *4. District courts within the Fourth Circuit have uniformly reached that same conclusion in published opinions. See *Philson* v. *Cold Creek Farms*, 947 F. Supp. 197, 200 (E.D.N.C. 1996) (stating that section 202(a) prohibits "only those unfair, discriminatory or deceptive practices adversely affecting competition"); *Griffin* v. *Smithfield Foods, Inc.*, 183 F. Supp. 2d 824, 827 (E.D. Va. 2002) (same).

Seventh Circuit: The Seventh Circuit has likewise held that section 202(a) requires a showing of competitive injury. In *Armour & Co.* v. *United States*, 402 F.2d 712, 717 (7th Cir. 1968), the court of appeals held that the defendant's conduct did not violate section 202(a) "absent some predatory intent or some likelihood of competitive injury." See also *id.* at 720. Petitioners assert that this ruling "ran counter to that court's own established interpretation of the PSA in *Wilson & Co.* v. *Benson*, 286 F.2d 891 (7th Cir. 1961)." Pet. 12. However, petitioners fail to acknowledge that in *Armour & Co.* the Seventh Circuit explicitly considered its prior holding in *Wilson & Co.* and reconciled the two cases. See *Armour & Co.*, 402 F.2d at 718 (explaining that the record in *Wilson &*

Co. "amply supported" the agency's finding that the challenged conduct was undertaken with the intent and actual effect of injuring competition) (citing *Wilson & Co.*, 286 F.2d at 895).

Petitioners also fail to mention the Seventh Circuit's holding in *Swift & Co.* v. *United States*, 308 F.2d 849 (7th Cir. 1962). In that case, the court of appeals held that an "agreement between competitive buyers to split or share the purchase" of livestock violated section 202(a). *Id.* at 853. In reaching this conclusion, the court made a point of analyzing the evidence of injury to competition, stating that the "essential nature and the necessary result of this arrangement or practice was to eliminate competition." *Id.* The Seventh Circuit noted this statement in *Armour & Co.* and relied upon it in harmonizing the Seventh Circuit's cases to require a showing of likelihood of injury to competition (or predatory intent) in cases brought under section 202(a). See 402 F.2d at 718.

Eighth Circuit: Petitioners incorrectly assert that the Eight Circuit has not addressed the question whether section 202(a) requires a showing of actual or likely competitive injury. See Pet. 13. In fact, in *IBP, inc.* v. *Glickman*, 187 F.3d 974, 977 (8th Cir. 1999), the Eighth Circuit addressed whether marketing agreements similar to those at issue in this case violated section 202(a). The court of appeals concluded that the challenged conduct was not an "unfair practice" under section 202(a) because it did not actually reduce competition or have the potential for reducing competition. See *id.* at 977.

Petitioners acknowledge and attempt to compare several other Eighth Circuit cases that are not on point: *Farrow* v. *United States Department of Agriculture*, 760 F.2d 211 (8th 1985), and *Van Wyck* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978). Pet. 13. Both cases address section 312(a) of the PSA—not the section at issue here. Moreover, the *Van Wyck* court did not discuss whether a showing of competitive injury was required or whether the injury addressed in the case was

competitive in nature. And in *Farrow* the court of appeals stated that, even under section 312(a), a practice can be declared to be "unfair" only "if it injures or is likely to injure competition." 760 F.2d at 214.

Ninth Circuit: According to petitioners, the conclusion that section 202(a) requires a showing of anticompetitive harm has been "rejected" by the Ninth and Tenth Circuits "as contrary to the PSA." Pet. 13. Petitioners cite *Spencer Livestock Commission Co.* v. *Department of Agriculture*, 841 F.2d 1451 (9th Cir. 1988), as support. Pet. 13. However, that case is inapposite. Rather than stating a claim under section 202(a), *Spencer* involved a claim under section 312(a) of the PSA, see 841 F.2d at 1453, which regulates the activities of stockyard owners, market agencies and dealers in the buying or selling of livestock. 7 U.S.C. § 213(a). Moreover, the plaintiff in *Spencer* asserted that the defendant had violated the PSA by engaging in a "deceptive practice." See 841 F. 2d at 1455. The Ninth Circuit held that this claim could be established "where the evidence establishes a deceptive practice, whether or not it harmed consumers or competitors." *Id.* Plainly, a claim of active deception on the part of a PSA defendant might be held to a different standard of proof than a claim that a practice is simply "unfair." But as the Eleventh Circuit noted, there is no claim of "deception" in this case. See *supra* at 1. Accordingly, because *Spencer* addressed a different section of the PSA and a legal theory not present here, the Ninth Circuit's decision in *Spencer* in no way conflicts with the opinion below.

Petitioners also cite *Blackfoot Livestock Commission, Co.* v. *Department of Agriculture*, 810 F.2d 916 (9th Cir. 1987) and *Sebastopol Meat Co.* v. *Secretary of Agriculture*, 440 F.2d 983 (9th Cir. 1971), to support their allegation of a circuit split. See Pet. 13. Like *Spencer*, *Blackfoot* involved section 312(a) of the PSA, not section 202(a). Moreover, in *Blackfoot* the court of appeals did not discuss whether any portion of the PSA requires a showing of competitive injury.

Sebastopol, in contrast, involved a claim under the same provision of the PSA as the instant case, section 202(a) (7 U.S.C. § 192(a)). However, in *Sebastol* the court of appeals did not address the question whether section 202(a) requires a showing of competitive harm. In fact, the "only issue" before the court was whether a cease and desist order issued by the Secretary of Agriculture could run against the owner of a company as an individual under an alter ego theory of liability. 440 F.2d at 983.

Petitioners' analysis of Ninth Circuit precedent omits an important and directly relevant case: *De Jong Packing Co.* v. *Department of Agriculture*, 618 F.2d 1329, 1331 (9th Cir. 1980). In *De Jong*, the court of appeals stated that a challenged practice is not "unfair" under section 202(a) unless the conduct actually reduces competition or has the potential for reducing competition. See *id.* at 1336-37 (stating that "unfair practices under § 202 are not confined to those where competitive injury has already resulted, but includes those where there is a reasonable likelihood that the purpose will be achieved and that the result will be an undue restraint of competition").

De Jong is the Ninth Circuit's most recent decision interpreting section 202(a) and the only reported decision from the Ninth Circuit to address the same legal claim of "unfairness" as the instant case. In light of the holding in *De Jong*, petitioners' claim that the Ninth Circuit has "rejected" the Seventh Circuit's view that section 202(a) requires competitive harm, whether actual or likely, is simply wrong.

Tenth Circuit: Petitioners' assessment of Tenth Circuit case law is similarly deficient. Petitioners cite *Hays Livestock Commission Co.* v. *Maly Livestock Commission Co.*, 498 F.2d 925 (10th Cir. 1974) and *Peterman* v. *Department of Agriculture*, 770 F.2d 888 (10th Cir. 1985). Pet. 13. Neither case is on point. *Hays Livestock* involved a claim under section 208 of the PSA, not section 202(a), see 498 F.2d at 932, and did not address the requirement of competitive

injury under any provision of the PSA. Likewise, *Peterman* does not contain any discussion of whether section 202 requires a showing of competitive injury and it addressed a legal claim not present in this case. In *Peterman*, the Tenth Circuit upheld the Department of Agriculture's finding that Peterman's sales tactics, including a "bait and switch" scenario, constituted "deceptive trade practices" in violation of the PSA. 770 F.2d at 890. But, the court's opinion does not identify which provision of the PSA was at issue or address any required nexus to competition. Moreover, as noted above, *supra* at 1, the allegation of active deception—which was the only issue in *Peterman*—is not present in this case.

In contrast, the recent case of *Excel Corp.* v. *Department of Agriculture*, 397 F.3d 1285 (10th Cir. 2005), involved a claim under section 202 and addressed the issue of competitive injury. Petitioners cite *Excel* for the proposition that section 202(a) does not require a showing of wrongful intent, but rather focuses on the acts the defendant committed. Pet. 15-16. Petitioners fail to acknowledge the Tenth Circuit's related discussion regarding competitive harm. In *Excel*, the Department of Agriculture found that Excel violated section 202(a) and its implementing regulation by failing to disclose to hog producers a change in its formula for computing the weight of hog carcasses. 397 F.3d at 1287. The court of appeals concluded that there was substantial evidence to support the agency's finding. *Id.* at 1293. The court's analysis of whether Excel violated section 202(a) contains two conclusions particularly important for purposes of the present case. First, as petitioners assert, the court rejected the argument that section 202(a) requires a showing of wrongful intent. *Id.* at 1294. Second, as petitioners ignore, immediately before refusing to impose an intent requirement, the court of appeals rejected Excel's argument that its actions did not harm competition. *Id.* Focusing on the issue of competitive harm, the Tenth Circuit noted that the agency

"specifically concluded" that Excel's actions impeded competition and held that this conclusion was a reasonable inference from the evidence presented. *Id.* Accordingly, although the Tenth Circuit found that a showing of the defendant's wrongful intent was not required to prevail under section 202(a), it did so after addressing whether the challenged conduct caused competitive injury.

* * * *

In sum, petitioners' assertion that the courts of appeals are split—with the Seventh and Eleventh Circuits on one side, the Ninth and Tenth Circuits on the other side, and the Fourth and Eighth Circuits undecided—does not withstand scrutiny. Petitioners' analysis depends on cases that do not involve the same provision of the PSA nor the legal claims at issue here, and the petition fails to address cases that are directly on point. In fact, the courts of appeals are in harmony in concluding that claims of "unfair" conduct under section 202(a) require a showing of actual or likely anticompetitive effect.

III. THIS CASE IS A POOR VEHICLE FOR REVIEW.

A. Petitioners Could Not Prevail Under Any Legal Standard.

The petition asserts that the district court and the Eleventh Circuit incorrectly applied Eleventh Circuit law governing the application of the rule of reason and the PSA. Pet. 7-21. But petitioners would not prevail even if this Court were to accept this case and ultimately rule for petitioners on the merits of these claims.

As noted above, in addition to concluding that petitioners failed to present sufficient evidence to demonstrate an injury to competition, the district court separately concluded that petitioners failed to present sufficient evidence to establish that the entire class was injured by Tyson's use of marketing agreements or the amount of any damages to the class. See

Pet. App. 34a-35a ("The Court finds that the evidence does not support a finding that each member of plaintiffs' class was injured."); *id.* at 35a-37a ("Defendant correctly points out that plaintiffs did not prove, at trial, the extent of class-wide damages or the volume of class members' sales on the cash market."). Accordingly, given the district court's holdings that petitioners failed to present sufficient evidence on other essential elements of their case, petitioners could not prevail regardless of the legal standard adopted by this Court on the issues presented in the petition.

B. Petitioners Failed To Present Sufficient Evidence For This Court To Meaningfully Address The Merits Of Their Claims.

As the opinions of the district court and court of appeals make clear, the evidentiary record in this case is sorely lacking. Petitioners failed to present sufficient evidence for this Court thoroughly to analyze the merits of the questions presented in the petition. For example, petitioners argue that the district court and court of appeals erred in failing to balance procompetitive justifications for Tyson's conduct against any anticompetitive effects caused by that conduct. Pet. 7-11. Aside from the fact that the district court *did* require such balancing, see *id.* at 23, Pet. App. 48a, a failure to balance procompetitive benefits and anticompetitive effects cannot matter in a case in which no anticompetitive effects were shown. Petitioners claim to have demonstrated an anticompetitive effect because they presented "expert" evidence concluding that Tyson's use of marketing agreements caused the price of fed cattle sold in the cash market to go down. Pet. 16-17. This argument simply assumes that any action which causes the price of goods to drop is *ipso facto* anticompetitive. Plaintiffs present no authority to support this assumption, which is simply unfounded. In sum, real proof of harm to competition in this case—with a showing that Tyson had the market power to cause anticompetitive effects in the relevant national

marketplace—was never made. Accordingly, as the opinions of the district court and court of appeals on the sufficiency of the evidence suggest, the factual record that would support this Court's review on the merits is lacking.

IV. THE DECISION BELOW IS CORRECT ON THE MERITS.

The courts of appeals, including the Eleventh Circuit in this case, are correct in holding that an "unfairness" claim under section 202(a) requires a showing of harm to competition. Pet App. 12a; see also *Philson*, 1998 WL 709324, at *4; *Armour & Co.*, 402 F.2d at 717; *IBP, inc.*, 187 F.3d at 977; *De Jong Packing Co.*, 618 F.2d at 1331. A jury finding that something is "unfair" does not necessarily mean it is illegal. In the context of the PSA, unfairness must be considered in relation to competition. "The primary purpose of the PSA was 'to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry.'" *London*, 410 F.3d at 1302 (quoting H.R. Rep. No. 85-1048, at 1 (1958), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5213). In other words, the PSA "was aimed at halting practices whose purpose was to destroy competition." Pet. App. 12a; see also *Mahon* v. *Stowers*, 416 U.S. 100, 106 (1974) (per curiam) ("[T]he 'chief evil' at which [the PSA] was aimed was 'the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells and unduly and arbitrarily to increase the price to the consumer who buys.'") (quoting *Stafford* v. *Wallace*, 258 U.S. 495, 514-15 (1922)). As a result, claims of unfair practices or price manipulation under the PSA, like those asserted by petitioners, require a showing of competitive harm. Pet. App. 12a.

Neither the text nor history of the PSA evidences a congressional intent "to interfere with a meat packer's business practices where those practices did not interfere with competition." Pet. App. 12a. The PSA was not intended to guarantee livestock producers success, nor did it mean to

interfere with the right of individuals to enter into pro-competitive contracts. See *IBP, inc.*, 187 F.3d at 977 ("We are ... mindful that the purpose behind the Act was not to so upset the traditional principles of freedom of contract, as to require an entirely level playing field for all.") (internal quotation marks omitted). Neither the cash market method of purchasing cattle nor the marketing agreements at issue in this case existed at the time the PSA was enacted and thus the Act could not have been intended to enshrine one of these purchasing methods in the law to the exclusion of the other. To the contrary, the Act is designed to encourage marketing innovations because, like other antitrust laws, "[t]he PSA was designed to promote efficiency, not frustrate it." *Jackson* v. *Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (9th Cir. 1995). Thus, "[i]f a packer's course of business promotes efficiency and aids competition in the cattle market, the challenged practice cannot, by definition, adversely affect competition." Pet. App. 13a.

Here, there was ample, undisputed evidence that "marketing agreements are a more efficient means for both meat packers and cattle producers to operate in the market." Pet. App. 20a. The Eleventh Circuit specifically noted that "[w]itnesses for both parties recognized that [marketing agreements have] pro-competitive benefits for the industry." *Id.* at 21a. Both the district court and the Eleventh Circuit analyzed in detail the evidence presented in support of Tyson's proffered pro-competitive justifications for marketing agreements, as well as petitioners' arguments that these benefits were pretextual. *Id.* at 14a-24a, 31a-34a. Both courts concluded that petitioners failed to present any evidence from which a reasonable jury could conclude that Tyson lacked competitive justifications for using marketing agreements. *Id.* at 25a, 31a. Petitioners' attempt to require the use of one historical method of purchasing cattle—to the exclusion of an innovative method with pro-competitive benefits that was initiated by cattle producers, not Tyson—

was properly rejected by the district court and the Eleventh Circuit. See *id.* at 25a. There is no basis for this Court to review this correct determination.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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February 21, 2006

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APPENDIX

APPENDIX A

[DO NOT PUBLISH]

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 04-14534
Non-Argument Calendar

HENRY LEE "LEROY" PICKETT, MIKE CALLICRATE, PAT GOGGINS, JOHNNY SMITH, W.J. ROTHWELL RANCH COMPANY, CHRISTOPHER J. ABBOTT,
Plaintiffs-Appellants,

SAM BRITT, *et al.*,
Plaintiffs,

v.

IOWA BEEF PROCESSORS,
Defendant,

TYSON FRESH MEATS, INC.,
Defendant-Appellee.

Aug. 19, 2005.

Appeal from the United States District Court
for the Middle District of Alabama.
D.C. Docket No. 96-01103-CV-S-N.

Before CARNES and COX, *Circuit Judges*, and MILLS,* *District Judge*.

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* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

PER CURIAM:

This is the companion appeal to *Pickett v. Tyson Fresh Meats, Inc.*, 04-12137, in which we affirmed the district court's judgment as a matter of law for Tyson Fresh Meats, Inc. in Henry Lee Pickett's class action lawsuit brought under the Packers and Stockyard Act of 1921.

In this opinion, we address Pickett's appeal from the district court's order assessing costs against him. After the district court granted Tyson's motion for judgment as a matter of law, Tyson filed its bill of costs pursuant to Fed.R.Civ.P. 54(d)(1). Pickett lodged both general objections to any costs being awarded to Tyson, and specific objections to individual items that Tyson claimed as reimbursable expenses. The district court overruled the general objections, sustained some of Pickett's specific item objections, overruled others, and ordered Pickett to pay $70,198.60 worth of costs to Tyson.

Pickett is not pursuing on appeal any of the specific objections he had to individual items in Tyson's bill of costs. Instead, he argues that Tyson, despite securing judgment as a matter of law in its favor, is not a "prevailing party" entitled to costs under Rule 54(d)(1), and that, even if it is, the district court abused its discretion in not rejecting Tyson's request for costs.

"'We review the factual findings underlying a district court's determination regarding prevailing party status for clear error. Whether the facts as found suffice to render the plaintiff a 'prevailing party' is a legal question reviewed *de novo*.'" *Lipscher v. LRP Publ'ns, Inc.*, 266 F.3d 1305, 1321 (11th Cir.2001) (quoting *Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co.*, 254 F.3d 987, 1012 (11th Cir.2001)). We review a district court's decision about whether to award costs to the prevailing party for abuse of discretion. *Chapman v. AI Transp.*, 229 F.3d 1012, 1039 (11th Cir.2000) (en banc).

Rule 54(d)(1) provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ." Fed.R.Civ.P. 54(d)(1). The parties agree that, other than Rule 54(d)(1), no other statute or rules apply to the costs in this case. Where their positions diverge is on the question of who is the "prevailing party."

A defendant is a prevailing party if the plaintiff achieves none of the benefits sought in bringing its lawsuit. "If the case is litigated to judgment on the merits in favor of the defendant, the defendant is the prevailing party." 10 *Moore's Federal Practice* § 54.171[3][c][iv], at 54-285 (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419-20, 98 S.Ct. 694, 699-700, 54 L.Ed.2d 648 (1978)).

Pickett sought damages from and injunctive relief against Tyson for practices he claimed were in violation of the Packers and Stockyard Act. He did not obtain any of the relief he sought. While the jury's answers to the interrogatory questions on the special verdict form were in Pickett's favor, the district court did not enter judgment on that verdict, and we have affirmed its decision not to do so. Because Pickett lost every aspect of the case and Tyson prevailed on it, Tyson is the "prevailing party" for purposes of Rule 54(d)(1).

Pickett contends that even so, the district court abused its discretion under Rule 54(d)(1) by failing to reject Tyson's request for costs. He relies primarily on *White & White, Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728, 731-32 (6th Cir. 1986), arguing that where the case is a "close and difficult" one, the non-prevailing party litigated the case in good faith, and it has significantly less financial resources then the prevailing party, a district court should not award costs under Rule 54(d). Pickett is wrong for a number of reasons.

First, good faith and limited financial resources are not enough to overcome the strong presumption in favor of awarding costs to the prevailing party. The Sixth Circuit in *White & White* itself stated that "[g]ood faith without more . . . is an insufficient basis for denying costs to a prevailing party." *Id.* at 731. Our own en banc decision in *Chapman v. Al Transportation* held that a district court should not consider the relative wealth of the parties in deciding whether to reject prevailing-party costs. 229 F.3d at 1039.

Second, this case was not a close and difficult one. As our opinion in the appeal on the merits explains, witnesses for both parties agreed that Tyson had a number of competitive justifications for its allegedly unfair practices. The legal issues were not particularly novel or difficult. Although it took a long time to try, the case was not especially complicated. In that respect, it differs from the complicated antitrust lawsuit involved in *White & White*. *See id.* at 733.

As we explained in *Chapman*, a district court needs a "sound basis" to overcome the strong presumption that a prevailing party is entitled to costs. There was none in this case. The district court did not abuse its discretion in awarding costs to Tyson under Rule 54(b)(1).

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 04-12137-D

HENRY LEE PICKETT, *et al.*,
Plaintiffs-Appellants,

vs.

TYSON FRESH MEATS, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Alabama, Northern Division
C.A. No. 96-A-1103-N
The Honorable Lyle E. Strom, Judge Presiding

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2. *The Trial Court Improperly Found that a Rule of Reason Analysis applied to Plaintiffs' Claims.*

In conjunction with the overall *Sherman Act* framework, Tyson also contended that a rule of reason analysis must be applied to its conduct. Plaintiffs objected to this contention in its pretrial filings (R12-626) and during the jury charge conference. Specifically, counsel for the Plaintiffs stated:

> And the whole—first of all, we don't think—and we've expressed this before. We don't think that the rule of reason has any place in the Packers and Stockyards Act analysis, that what you ought to give the jury is the language of the statute and not limit that through the rule of reason kind of instruction. And we object to the inclusion of the rule of reason analysis, period.
>
> If it is going to—secondarily, if it is going to be included, then number one, we think as discussed in the last full paragraph on page 2 of this section from Professor Areeda's treatise—and it's paragraph 1507b that I'm reading from, that I'm citing specifically—the way the analysis goes, once the plaintiff satisfies his burden of persuasion of the existence of a significant restraint, he will prevail unless the defendants introduce evidence sufficient to allow the tribunal to find that their conduct promotes a legitimate business objective. The plaintiff may rebut this by introducing evidence that the objective is illegitimate or that the restraint is not reasonably necessary to achieve it. And then it goes on to discuss balancing the—weighing and balancing the harm against the benefit in the course of the analysis. (R40-3105:3-23)[22]

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[22] *See also*, (R40-3107:12-3108:8; R40-3112:1-11)

A "rule of reason" defense is not appropriate in a 7 U.S.C. § 192 Packers & Stockyards Act case. If the Defendant committed a violation of 7 U.S.C. § 192, it is liable for the damages it caused, even if it had a business reason for its conduct that was, for example, unfair. The statute is designed to codify and implement a national public policy that protection of the market for producers of meat-bearing animals is a greater public value than allowing packers to deal at the market place as they wish so long as they have a business reason to do so.

"[T]he Packers and Stockyards Act is remedial legislation and should be liberally construed to further its life and fully effectuate its public purpose." *Bruhn's Freezer Meats of Chicago, Inc. v. U.S.D.A.*, 438 F.2d 1332, 1336 (8th Cir 1971). The *Act* also "is one of the most comprehensive regulatory measures ever enacted.[']" Christopher R. Kelley, *An Overview of the Packers and Stockyards Act*, 1 The National Agricultural. Law Center (April 2003). "The Act was framed in language designed to permit the fullest control of packers and stockyards which the Constitution permits, and its coverage was to encompass the complete chain of commerce . . . ." H.R. 324, 67th Cong., 1st Sess. (1921); H.R. 77, 67th Cong., 1st Sess. (1921). *Id. Bruhns*, 438 F.2d at 1339.

The District Court relied upon dicta from *I.B.P. v. Glickman*, 187 F.3d 974 (8th Cir. 1999) to support its conclusion that Tyson's "reliable supply" justification is a complete defense. Such a reading clearly overstates the narrow holding of *Glickman*. In *Glickman*, the U.S.D.A. challenged agreements that provided IBP with the right of first refusal on cattle in a group of Kansas feedlots known collectively as the Beef Marketing Group ("BMG") *Id.* at 976. The U.S.D.A. argued to the judicial officer that the agreement (1) was an unreasonable preference, and (2) had the potential effect of harming competition. *Id.* The judicial officer found that the agreement did not provide an unreasonable preference, but that the

agreement did have the effect or the potential effect of reducing competition. *Id.* at 976-977.

On appeal, the Eighth Circuit found that there was no actual effect on competition. *Glickman*, 187 F.3d at 977. This finding was based primarily upon U.S.D.A.'s admission that no actual price reduction resulted for feedlots outside the agreement. *Id.* at 976 n.4. The basis for the decision was the lack of showing of either actual or potential harm to competition. Absent a finding of harm, the agency could not prevail. Any discussion of justification was superfluous.

Glickman is easily distinguished from this action. First, Plaintiffs did not pursue a preference claim at trial. Second, and more important, unlike in *Glickman*, the jury in this action found an actual effect on competition. Additionally, the jury was free to reject Tyson's claims of business justifications, which it did in answering special interrogatory #3, including the evidence relating to the reliable supply defense. The Eighth Circuit dicta did not bind this jury, or any other jury, to make findings of fact in Tyson's favor. The jury properly rejected Tyson's evidence and found for the Plaintiffs.

In sum, the trial court improperly found that a rule of reason defense applied to Plaintiffs' claims under the PSA.

3. *If the Rule of Reason does apply to Plaintiffs' PSA Claim, the Trial Court Erred in Applying its Rule of Reason Analysis.*

After convincing the court that a rule of reason analysis applied to Plaintiffs' PSA claim, Tyson further argued that under Eleventh Circuit precedent if a defendant can show that its business practices have any pro-competitive effect or justification then it cannot be held liable under a rule of reason analysis. Tyson also argued that Eleventh Circuit law was different from other circuits in this regard.

Plaintiffs objected to the proposed jury charge on this issue. (R40-3105:10-3106:3). Plaintiffs informed the court that if it did apply a rule of reason test to this action, then the court should allow the jury to weigh the alleged pro-competitive effects against the negative effects of Tyson's use of captive supply. Tyson again led the trial court into error on this point.[23]

Levine v. Central Florida Medical Affiliate, 72 F.3d 1538 (11th Cir. 1996), the principal case upon which Tyson relied, states that a rule of reason analysis requires a plaintiff to prove (1) an anticompetitive effect of the defendant's conduct on the relevant market, and (2) that the conduct has no procompetitive benefit or justification. 72 F.3d at 1551 (*citing Consultants & Designers, Inc. v. Butler Serv. Group*, 720 F.2d 1553, 1562 (11th Cir. 1983))[24]

However, *Consultants & Designers, Inc. v. Butler Serv. Group*, the very case that *Levine* cites to and relies upon actually shows that a weighing of anti-competitive and pro-competitive effects is required under a rule of reason analysis. There, this Court stated:

> Under the rule of reason it is necessary to establish that the covenant had an adverse impact on competition. As this court said in *H & B Equipment Co. v. Interna-*

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[23] During the charge conference, counsel for Tyson acknowledged that the court's charge to the jury and special interrogatories were quite favorable to his client.

> THE COURT: Well, having heard the plaintiffs' objections, I'm not surprised by your response.
>
> MR. JORGENSEN: Yeah. They don't—*not all your instructions favor us.* We wish the law were different in some instances, *but they're very good.* (R40-3132:15-19) (emphasis added)

[24] Both *Maris Distributing Company*, 302 F.3d at 1213 and *Southern Card & Novelty Inc.*, 138 F.3d at 876, the other two cases upon which Tyson relied, cited to the above-referenced portion of *Levine*.

tional Harvester Co., 577 F.2d 239, 246 (5th Cir.1978): The first step in establishing an unreasonable restraint of trade is to show anticompetitive effect, either in intrabrand or interbrand markets. . . . Absent anticompetitive effect, an unlawful intent will not establish a rule of reason violation, *Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 38 S. Ct. 242 [243], 62 L.Ed. 683 (1918), nor will the use of unfair methods of competition. Similarly, in *Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 571 (5th Cir.1978), *cert. denied*, 440 U.S. 909, 99 S. Ct. 1218, 59 L.Ed.2d 457 (1979), we held:

> [T]he rule of reason standard hinges the ultimate legality of a restraint on whether the plaintiff has demonstrated an anticompetitive *effect which is not offset by a need to achieve a procompetitive benefit or justification. The questions of whether Butler's enforcement of its covenant has any anticompetitive effect and whether this effect is outweighed by any procompetitive benefits are not really separate from one another. Our analysis will consequently treat these issues as a single problem to be analyzed and resolved as a unit.* An anticompetitive or procompetitive effect must be judged in relation to a market, for it is in that conceptual space that competition takes place.

720 F.2d at 1562 (emphasis added)

It is clear, therefore, that the very case *Levine* relies upon for the proposition that a plaintiff must show that a defendant's conduct has no pro-competitive effects does not in fact stand for that proposition. Instead, it demonstrates that a defendant must make some showing of a need or a justification for the restraint in terms of pro-competitive benefits. It is also evident that a weighing of the anti-competitive and procompetitive benefits should take place. Accordingly, the trial

court improperly applied the rule of reason analysis to Plaintiffs' PSA claim.

Other case law from the Eleventh Circuit also supports this type of analysis for a rule of reason inquiry. For example, in *Graphic Products Distributors v. ITEK Corp.*, 717 F.2d 1560 (11th Cir. 1983) the court described a rule of reason inquiry in the context of intrabrand and interbrand competition. It stated:

> Having crossed this threshold, GPD was required to take its "first step": "show [an] anticompetitive effect, either in the intrabrand or interbrand markets." *H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 246 (5th Cir.1978). *We emphasize, however, that demonstrating an anticompetitive effect is but the first step of what must be a systematic comparison of the negative effects of the restraint on intrabrand competition and interbrand competition, if any, with any alleged positive effects on interbrand competition stemming from the restraints.* This is the critical analysis required by *Sylvania*. *Muenster Butane*, 651 F.2d at 296. *Accord Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 483 F.Supp. 750, 760 (D.Md.1980), *aff'd*, 638 F.2d 15 (4th Cir.1981). 717 F.2d at 1571 (emphasis added).
>
> * * * * *
>
> To require an antitrust plaintiff to conjure up every possible pro-competitive rationale for a vertical restraint, and prove their inapplicability to the restraint in question, would be to impose an insurmountable burden. It would, in effect, convert the rule of *Sylvania*—that pro-competitive interbrand effects of vertical restraints must be considered—into a rule of per se legality for intra-brand restraints. *Sylvania* clearly does not extend that far, and we decline to so extend it on the facts of the case before us. 717 F.2d at 1573.

* * * * *

> Of course, *Itek was free to come forward with a showing that, notwithstanding its market power, the vertical restraints were reasonably necessary to achieve legitimate, pro-competitive purposes, and that the purpose and effect of the restraints were pro-competitive when viewed as a whole.* We now apply this analytical framework to the present case by analyzing first the effect of the intrabrand restraints on consumer welfare, in light of the interbrand market structure. We then analyze any possible pro-competitive effects on interbrand competition. 717 F.2d at 1573. (emphasis added)

* * * * *

> This allocation of burdens is consistent with our holding in *Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 571 (5th Cir.1978), *cert. denied*, 440 U.S. 909, 99 S. Ct. 1218, 59 L.Ed.2d 457 1979), *that "the rule of reason standard hinges the ultimate legality of a restraint on whether the plaintiff has demonstrated an anticompetitive effect which is not offset by a need to achieve a pro-competitive benefit or justification.*" (citations omitted). 717 F.2d at 1573 n.24 (emphasis added).

It is evident, therefore, that the court applied an improper rule of reason standard to Tyson's conduct in this action. If the court had applied the correct standard, as Plaintiffs requested, it would have been required to weigh the alleged competitive justifications of Tyson's conduct against the harm that its use of captive supply had caused. Such a weighing, in light of the jury's finding regarding pretext, would have required the court to deny Tyson's Rule 50 motion.

As the trial court's finding regarding Rule 50 is entitled to no deference, and this Court applies the same standard *de novo*, this Court should vacate the court's order and render judgment for the Plaintiffs on this additional basis.

* * * *

No. 05-864

IN THE

Supreme Court of the United States

HENRY LEE "LEROY" PICKETT, *et al.*,
Petitioners,

v.

TYSON FRESH MEATS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED

First. Whether the rule of reason analysis, and its requirements of (1) a detailed analysis of any anticompetitive business practice within an industry and (2) weighing the anticompetitive practice against any procompetitive benefit derived from that practice, remains valid or, as the Eleventh Circuit—the lone outlier on this question—determined, the rule of reason may be replaced with an inverted quick look analysis that approves anticompetitive practices so long as *any* procompetitive benefit derives from an anticompetitive practice.

Second. Whether, as an issue of first impression that will resolve a deepening split among the circuits, a private plaintiff suing under section 202 of the Packers and Stockyards Act, 7 U.S.C. § 192, must show that a challenged practice has an adverse effect on competition or—consistent with the language of the statute—only that the practice was unfair, intended to manipulate or control prices, or has the effect of manipulating or controlling prices.

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Cal. Dental Ass'n v. FTC, 526 U.S. 756, 119 S. Ct. 1604 (1999)	6
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Levine v. Cent. Fla. Med. Affiliates, Inc., 72 F.3d 1538 (11th Cir. 1996)	*passim*
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Stafford v. Wallace, 258 U.S. 495, 42 S. Ct. 397 (1921)	9
Wilson & Co. v. Benson, 286 F.2d 891 (7th Cir. 1961)	9

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Kolasky, *Counterpoint: The Department of Justice's "Stepwise" Approach Imposes Too Heavy a Burden on Parties to Horizontal Agreements*, Antitrust 41 (Spring 1998) 6

Office of Inspector General, U.S. Dep't of Agric., Report No. 30601-01-Hy, *Grain Inspection, Packers and Stockyards Administration's Management and Oversight of the Packers and Stockyards Programs* (Jan. 10, 2006) 7, 8

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HENRY LEE "LEROY" PICKETT, *et al.*,
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TYSON FRESH MEATS, INC.,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONERS

Contrary to the assertions of Tyson Fresh Meats, Inc. in its brief in opposition, this case is very much worthy of certiorari review. In addition to the reasons Pickett stated in the petition, two other points show why this Court should grant review. First, Tyson conceded at trial the clear split of authority that the first question presented would resolve, and Tyson's waiver argument is flat wrong. Second, a report by the United States Department of Agriculture released shortly after the petition was filed confirms the importance of the second question presented regarding the Packers and Stockyards Act (PSA). 7 U.S.C. § 181, *et seq*. The narrow questions presented by the petition would allow the Court to resolve important splits of authority among the courts of appeals.

First. The Court's review is warranted because, in the words of Tyson's counsel during the jury charge conference:

> I would just submit, Your Honor, that it would be an error for you to give any other instruction than the one you're giving. I've read the Areeda Treatise, not just the section you've been given, but the whole thing; and it is not followed in the Eleventh Circuit. *The Eleventh Circuit has been very clear in what the burden is in the Eleventh Circuit. It's been very clear that it's different from the other circuits. And I've got the citations.*
>
> . . .
>
> . . . If I could just read the snippet, quote, Rule of reason analysis requires the plaintiff to prove, number one, an anticompetitive effect of the defendant's conduct on the relevant market and, number two that *the conduct has no procompetitive benefit or justification*, which is exactly how you framed it, Your Honor.

Reply App. at 4a-5a (emphasis added). It is not clear from the brief in opposition exactly what happened to the citations on which Tyson relied, but it is clear that Tyson has not done justice to the record of this case.

Given the position Tyson advocated throughout this case, it is stunning that Tyson would now assert that the "lopsided conflict in the federal circuits" regarding the rule of reason is "not real." Opp. at 2. Throughout the life of this case, Tyson's counsel has consistently stated that, under *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996), and recent Eleventh Circuit precedent, the burden of proof regarding "the anticompetitive effects of the defendant's conduct, as the Eleventh Circuit says, on the relevant market and no procompetitive benefit or justification, the burden of both of those points, both of those elements, is on the plaintiff, as the Eleventh Circuit has made clear." Reply App. at 5a. Before the district court, Tyson confirmed that the clear split of authority Pickett's first question presents

is indeed cert-worthy: Tyson's counsel "frank[ly]" told the trial judge that it was both "interesting[]" and "important[]" that "in the rule of reason analysis . . . *other circuits have used the balancing. The Eleventh Circuit has not.*" *Id.* at 6a (emphasis added). Rather than conceding the cert-worthiness of the first question presented, Tyson has crafted an amnesiac argument that hopes to obscure this clear split of authority. At best, Tyson's argument is mistaken regarding the record; at worst, Tyson's argument is deliberately misleading. Under either reading, Tyson's argument is just plain wrong.

Tyson's further assertion that Pickett waived his argument regarding the rule of reason jurisprudence of the Eleventh Circuit is similarly baseless. Pickett never wavered from his position that, if the rule of reason applied at all in PSA cases, Eleventh Circuit precedent should recognize that, under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50, 97 S. Ct. 2549, 2557 (1977); Reply App. at 1a-2a. Before the district court, Pickett stated clearly that "under a rule of reason analysis a fact finder should weigh the anti-competitive and any pro-competitive benefits of a restraint in order to determine" whether the use of captive supply violated the PSA. R12-646-1 to -2. Tyson, by contrast, argued for a jury charge based on *Levine*'s erroneous formulation of the rule of reason, Reply App. at 4a; received its desired instruction, Pet. App. at 46a-47a; and persuaded the district court to use that erroneous test in its opinion granting judgment as a matter of law, Pet. App. at 30a-31a. The trial judge himself acknowledged that Pickett had made an adequate record for appeal. Reply App. at 7a.

Before the court of appeals, Pickett argued that the district court erred when it relied on *Levine*, the case that created the inverted quick look test used by the Eleventh Circuit. Opp. App. at 12a-16a. There, Pickett argued—as he has at every

level—that pre-*Levine* caselaw in the Eleventh and the Old Fifth Circuits followed the jurisprudence of this Court and was in harmony with the other courts of appeals. *See, e.g., Consultants & Designers, Inc. v. Butler Serv. Group, Inc.*, 720 F.2d 1553, 1562 (11th Cir. 1983); *Graphic Prods. Distribs., Inc. v. ITEK Corp.*, 717 F.2d 1560, 1573 (11th Cir. 1983) ("To require an antitrust plaintiff to conjure up every possible pro-competitive rationale . . . , and prove their inapplicability to the restraint in question, would be to impose an insurmountable burden."); *H&B Equip. Co. v. Int'l Harvester Co.*, 577 F.2d 239, 246 (5th Cir. 1978); *Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 571 (5th Cir. 1978). Pickett has consistently maintained that the burden the *Levine* test imposes on antitrust plaintiffs is both virtually insurmountable and conflicts directly with accepted precedent.

Pickett also petitioned for rehearing en banc regarding whether—in the light of contrary prior precedent from this Court, the Old Fifth Circuit, and the Eleventh Circuit—the court of appeals could use the inverted quick look analysis employed by both the panel and the district court. *See* Pet. for Reh'g En Banc at ii, 18-20, *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272 (11th Cir. 2005) (petition for rehearing en banc denied Oct. 7, 2005). Unfortunately, Pickett's petition for rehearing en banc fell on deaf ears. In this case, the Eleventh Circuit reaffirmed its decade-long adherence to the inverted quick look test of *Levine* and solidified the circuit split that this Court should address.

Now that the Court has been given a clear presentation of both (1) the parties' unanimity regarding the circuit split caused by the Eleventh Circuit in rule of reason cases and (2) the meticulous record Pickett has built on this issue, it is helpful to understand how the split occurred. In *Levine*, the Eleventh Circuit wrote that the "[r]ule of reason analysis requires the plaintiff to prove (1) an anticompetitive effect of the defendant's conduct on the relevant market, and (2) that

the conduct has no procompetitive benefit or justification. *E.g., Consultants & Designers*, 720 F.2d at 1562." *Levine*, 72 F.3d at 1551.

Contrary to the statement of the *Levine* court, however, *Consultants & Designers* was faithful to this Court's rule of reason jurisprudence. In that case, the Eleventh Circuit recognized that the rule of reason required a balancing of procompetitive benefits against anticompetitive harms:

> The rule of reason standard hinges the ultimate legality of a restraint on whether the plaintiff has demonstrated an anticompetitive effect which is not offset by a need to achieve a procompetitive benefit or justification.

Consultants & Designers, 720 F.2d at 1562 (quoting *Kestenbaum*, 575 F.2d at 571, and citing *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238, 38 S. Ct. 242, 243 (1918); *H&B Equipment*, 577 F.2d at 246) (internal alteration removed). The other pre-*Levine* caselaw Tyson cites in its brief in opposition also was faithful to the accepted formulation of the rule of reason. Opp. at 8-9 (citing *Graphic Prods.*, 717 F.2d at 1573). *Levine*, however, was absolutely unfaithful to the prior precedent of this Court, the court of appeals, and its predecessor circuit, and the *Levine* test conflicts with the jurisprudence of every other federal circuit.

Despite the clear split of authority on this issue, the Eleventh Circuit has adhered to the inverted quick look test of *Levine* on several occasions. Both *Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc.*, 138 F.3d 869, 876 (11th Cir. 1998), and *Maris Distributing Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1213 (11th Cir. 2002), based their erroneous formulations of the rule of reason on *Levine*. *See, e.g.*, Reply App. at 4a-5a. The Eleventh Circuit has declined to conform to the precedents of this Court, the Old Fifth Circuit, and its own correct, pre-*Levine* decisions. Rather than recon-

ciling its inverted quick look test to the mountain of precedent against it, the Eleventh Circuit has held to its erroneous test and made no attempt to distinguish the clear statements of law contrary to its position.

The record shows that both the district court and the court of appeals disregarded Pickett's clear and consistent arguments regarding the rule of reason. The Eleventh Circuit, loath to abandon the inverted quick look analysis, stayed faithful to the test it created in *Levine* and contravened the precedent of this Court and the other courts of appeals. *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344 n.16, 102 S. Ct. 2466, 2473 n.16 (1982) (anticompetitive harms "*must be balanced against*" procompetitive benefits) (quoting *Continental T.V.*, 433 U.S. at 50 n.16, 97 S. Ct., at 2557 n.16) (emphasis added). *See also Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 781 n.15, 119 S. Ct. 1604, 1618 n.15 (1999) (citing Kolasky, *Counterpoint: The Department of Justice's "Stepwise" Approach Imposes Too Heavy a Burden on Parties to Horizontal Agreements*, Antitrust 41, 43 (Spring 1998) ("[I]n applying the rule of reason, the courts, *as with any balancing test*, use a sliding scale to determine how much proof to require") (emphasis added)). The court of appeals nevertheless maintained that (1) Pickett must show that "marketing agreements have no pro-competitive justifications," Pet. App. at 11a; (2) Pickett could not prevail unless "there is evidence from which a jury reasonably could find that none of Tyson's asserted justifications are real, that each one is pretextual," *id.* at 14a; and (3) Pickett "did not present any evidence from which a reasonable jury could conclude that Tyson lacked pro-competitive justifications for using the agreements," *id.* at 25a.

Pickett and Tyson agree that "the Eleventh Circuit does not use the balancing test" and that the split of authority is clear, important, and very much real; as Tyson's counsel "frank[ly]" stated before the district court, "other circuits have used the

balancing. The Eleventh Circuit has not." Reply App. at 6a. Pickett's clear and consistent position regarding the rule of reason has been preserved in a meticulous record in both the district court and the court of appeals in anticipation of certiorari review. It is an unfortunate coincidence that, as Tyson asserts, "this Court lacks the benefit of the Eleventh Circuit's analysis" regarding the first question presented. Opp. at 2. Litigants in the Eleventh Circuit have lacked the benefit of that court's analysis for nearly a decade and, because the Eleventh Circuit has hewn to its inverted quick look analysis for so long, the only manner of resolving this untenable, "lopsided" split is certiorari review.

Second. Review in this Court is warranted because of the well-defined split of authority regarding what plaintiffs must prove in cases under the Packers and Stockyards Act. A recent report of the Inspector General (IG) of the United States Department of Agriculture underscores the importance of that deep and untenable split.

The IG discussed the enforcement of the PSA through the Packers and Stockyards Programs (P&SP) run by the Grain Inspection, Packers and Stockyards Administration (GIPSA), which is the administrative agency "responsible for: (1) maintaining fair trade practices in the marketing of livestock, (2) providing financial protection for participants in livestock transactions, and (3) ensuring open competitive marketing conditions for livestock and meat." Office of Inspector General, U.S. Dep't of Agric., Report No. 30601-01-Hy, *Grain Inspection, Packers and Stockyards Administration's Management and Oversight of the Packers and Stockyards Programs* 1 (Jan. 10, 2006) (hereinafter "*IG Report*"). The report discusses at length the substandard investigative and enforcement arms of GIPSA, and concludes that "competition and complex investigations were not being performed, and timely action was not being taken on issues that impact day-to-day activities." *IG Report* at i. The P&SP at GIPSA has "mate-

rial weaknesses" when it comes to "essential activities for administering and enforcing the" PSA. *Id.*

The report concludes that the inadequate administrative enforcement of the PSA has stunted the usefulness of the PSA:

> Since P&SP is not performing competition and complex investigations, no referrals are being made to the Office of the General Counsel . . . for formal administrative action. In February 2005, P&SP referred one competition investigation to OGC. The most recent referral prior to February 2005 was November 2002, over two years earlier. *OGC filed no administrative complaints against market participants for anti-competitive practices since 1999 due to the lack of referrals by P&SP.*

Id. at ii (emphasis added).

The administrative oversight function also had been corrupted because the agency was inflating its reports of investigations. *Id.* at 6. The Atlanta regional office, located at the home of the Eleventh Circuit, "climbed from last to first among the three regions [in the GIPSA enforcement statistics] by reclassifying over 300 routine activities as investigations." *Id.* at 7.

GIPSA, however, has long been deficient regarding its enforcement capabilities. In 1997, the IG determined that GIPSA did not have the capacity "for proper monitoring of the livestock procurement market for anti-competitive behavior," which led to a major reorganization of GIPSA. *Id.* at 2. In 2000, the Government Accountability Office determined that, even after GIPSA had completed its reorganization, two issues prevented the agency from investigating properly concerns regarding anticompetitive practices within the livestock markets: First, GIPSA did not involve its own attorneys in investigations; second, its investigative methods were "not suited for the more complex" anticompetitive practices that the packers were accused of employing. *Id.* at 3. The

agency's inadequacy harms all of the participants in the financial markets GIPSA should oversee which, according to the USDA, includes the $78 billion economic impact that comes from the cattle market. USDA Economic Research Service, *Background Statistics: U.S. Beef and Cattle Industry*, available at http://www.ers.usda.gov/news/BSECoverage.htm (last visited Mar. 1, 2006). In 2004 alone, there were "32.728 million head" of cows slaughtered in the U.S. *Id.*

The administrative mechanisms for enforcing the PSA are broken. Private parties, therefore, have been forced to litigate PSA cases to ensure that the promises in the PSA are not illusory. Congress understood that private parties would play a very important role in enforcement of the PSA when it clarified that there should be a private right of action under the statute. 7 U.S.C. § 209(b). As the petition shows, this Court has not spoken on the PSA in any meaningful way since that provision was added. Pet. at 12; *Mahon v. Stowers*, 416 U.S. 100, 94 S. Ct. 1626 (1974) (per curiam) (most recent Supreme Court case discussing the PSA). For more than thirty years, the courts of appeals have struggled with issues arising under the PSA without guidance from this Court.

There is no question that "Congress understood the sections of the [PSA] under consideration were broader in scope than the antecedent legislation. . . . [A]lthough Congress gave the Federal Trade Commission wide powers to prohibit unfair methods of competition, such authority is not as wide-ranging as that given to the Secretary of Agriculture under" the PSA. *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961). Because the agency responsible for enforcing the PSA is either unable or unwilling to enforce the PSA, this Court should ensure that private litigants can enforce the PSA which, as "remedial legislation," "should be construed liberally so as to effectuate the purpose of Congress." *Bowman v. United States Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966) (citing *Stafford v. Wallace*, 258 U.S. 495, 521, 42 S. Ct. 397,

403-04 (1921)). The only avenue for effectuating the language of the statute, fulfilling the purpose of the PSA, and finally closing the broad split of authority among the courts of appeals is review by this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE IDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 96-A-1103-N

HENRY LEE "LEROY" PICKETT, *et al.*,
Plaintiffs,

VS.

TYSON FRESH MEATS, INC.,
Defendant.

VOLUME XIX

JURY TRIAL

BEFORE THE HONORABLE LYLE E. STROM, UNITED STATES DISTRICT JUDGE, and a jury, at Montgomery, Alabama, on Monday, February 9, 2004, commencing at 9:31 a.m.

* * * *

[3104] [MR. WHATLEY:] In the—in the whole rule of reason area—we're going to cross this bridge several times, Your Honor—the issue is not just that the defendant contends that it has legitimate business reasons. And if I could, I'd like to hand up the portion of Professor Areeda's treatise that deals with [3105] this issue and burdens of proof where there's a rule of reason question.

And the whole—first of all, we don't think—and we've expressed this before. We don't think that the rule of reason has any place in the Packers and Stockyards Act analysis, that what you ought to give the jury is the language of the statute

and not limit that through the rule of reason kind of instruction. And we object to the inclusion of the rule of reason kind of instruction. And we object to the inclusion of the rule of reason analysis, period.

If it is going to—secondarily, if it is going to be included, then number one, we think as discussed in the last full paragraph on page 2 of this section from Professor Areeda's treatise—and it's paragraph 1507b that I'm reading from, that I'm citing specifically—the way the analysis goes, once the plaintiff satisfies his burden of persuasion of the existence of a significant restraint, he will prevail unless the defendants introduce evidence sufficient to allow the tribunal to find that their conduct promotes a legitimate business objective. The plaintiff may rebut this by introducing evidence that the objective is illegitimate or that the restraint is not reasonably necessary to achieve it. And then it goes on to discuss balancing the—weighing and balancing the harm against the benefit in the course of the analysis.

The first thing, we submit, is that the defendant has to show—if we're going to put rule of reason in this—and [3106] we object to doing so; but if you are, the defendant has to show that what it is doing is necessary to the achievement of the benefit—

* * * *

[3118] MR. WHATLEY: And with that, I can turn to the verdict form. The—if I could hand this up, Your Honor.

THE COURT: Go ahead.

MR. WHATLEY: And Your Honor—

MR. HOPSON: Mr. Whatley, is that the same verdict form we've seen previously from you?

MR. WHATLEY: We've given you several, and I honestly don't know whether this was—this was on one we gave you or not. I think it was not.

MR. HOPSON: Thank you, sir.

MR. WHATLEY: We may have given it to you, but my best judgment is we did not.

* * * *

[3119] In terms of the use of captive supply, we think the question, again, is related to whether it was used to—with respect to IBP's purchases of fed cattle. We've given you language that we think gets to that point much more specifically in the proposed question we've given you.

In terms of the business justification, the issues we discussed before, I think if you're going to include that issue in here, number one, competitive justification has to come out. Number two, the burden is in the wrong place. Number three, there is no requirement that they show that the conduct was necessary to achieve the legitimate business reason. Number four, there is no possibility of us rebutting this in the ways that I discussed earlier, either by showing that it was not a legitimate business justification or that the conduct was—was not necessary—that it could be—the business justification could be achieved in a lesser—in another way that's less restrictive. And so you have to—if you're going to include that in here, you have to include those subparts, necessarily, [3120] to get down to the point in order to get to an end result that is consistent with the rule of reason as discussed in the case—in the cases under the Sherman Act and summarized by Professor Areeda.

* * * *

[3132] MR. JORGENSEN: On instruction 12, we get into the legal argument we've had from plaintiffs today. Let me just begin my response to that by saying we've litigated this whole case under certain, I think, well understood agreement about what the law is. We've all talked about the need to prove a national market or to define the relevant market, to

prove the relevant market to show either an actual anti-competitive effect upon that market or the potential for anticompetitive effect. And as subsets of those requirements, they need to show market power and the lack of any valid business justification.

Now, I'll say the defendant's view of your instructions, Your Honor, is that they accurately state the law in the vast degree. We have a few—a few little nicks, but not much.

THE COURT: Well, having heard the plaintiffs' objections, I'm not surprised by your response.

MR. JORGENSEN: Yeah. They don't—not all your instructions favor us. We wish the law were different in some instances, but they're very good—

THE COURT: What do you think about Mr. Whatley's objection with respect to who has the burden of going forward with the evidence on this issue of justification?

MR. JORGENSEN: I would just submit, Your Honor, that it would be an error for you to give any other instruction than the one you're giving. I've read the Areeda Treatise, not just [3133] the section you've been given, but the whole thing; and it is not followed in the Eleventh Circuit. The Eleventh Circuit has been very clear in what the burden is in the Eleventh Circuit. It's been very clear that it's different from the other circuits. And I've got the citations.

THE COURT: What cases are you relying on?

MR. JORGENSEN: Maris Distributing Company.

THE COURT: Give me the cite.

MR. JORGENSEN: 302 F.3d 1207, and the pinpoint cite is 1213. If I could just read the snippet, quote, Rule of reason analysis requires the plaintiff to prove, number one, an anticompetitive effect of the defendant's conduct on the relevant market and, number two, that the conduct has no

procompetitive benefit or justification, which is exactly how you framed it, Your Honor. The Eleventh Circuit—

THE COURT: That must have been the case I had in front of me. I didn't realize that.

MR. JORGENSEN: Yeah. The Eleventh Circuit has reaffirmed that, that holding. I'll just give you the citation. 72 F.3d—

THE COURT: What was 302 F.3d?

MR. JORGENSEN: Yeah. 302 F.3d 1207.

THE COURT: 72 doesn't confirm—

MR. JORGENSEN: Oh, I'm sorry. You're exactly right. Maris Distributing is affirming the first one. It starts in [3134] Southern Card, which is—no, let me back up. It starts with Levine, which is 72 F.3d.

THE COURT: What page?

MR. JORGENSEN: 1538 is the first page. 1551 is the pinpoint cite. That's 1996. Then it's reaffirmed in 1998 at 138 F.3d 869, pinpoint cite 876.

THE COURT: All right.

MR. JORGENSEN: And then affirmed again in 2002 in Maris Distributing, which is the 302 F.3d 1207, 1213. And we've cited all those, Your Honor, in our motion for judgment as a matter of law.

THE COURT: I knew I had the case. I just didn't realize it was 302 F.3d I was using. All right.

MR. JORGENSEN: Now, importantly, as we talked about both of these, the anticompetitive effects of the defendant's conduct, as the Eleventh Circuit says, on the relevant market and no procompetitive benefit or justification, the burden of both of those points, both of those elements, is on the plaintiff, as the Eleventh Circuit has made clear. And

interestingly, also importantly, the Eleventh Circuit does not use the balancing test that the plaintiffs urged upon you. The quote is that the conduct has no procompetitive benefit or justification.

Now, to be frank with Your Honor, in the rule of reason analysis outside of the Packers and Stockyards Act context, [3135] other circuits have used the balancing. The Eleventh Circuit has not. And within the Packers and Stockyards Act context, I'm not aware of any case that has used a balancing in terms of the procompetitive benefits and valid business justifications. In Glickman, as you pointed out, the Court found that IBP did not violate the PSA as a matter of law because it had a procompetitive benefit. And it said the benefit was, quote, a more reliable and efficient method of obtaining a supply of cattle.

But that's not the only case, Your Honor. Armour & Company held that the Seventh Circuit as well. That's 403 F.2d at page 725, is the exact section. And the quote is, Competitive justifications for a business plan negate its being unjust, undue, or unreasonable; again, without balancing. If you have a justification, you do not violate the PSA. Swift & Company, 105 F.2d. The pinpoint cite is 857-58. Again, they had a single valid business justification, and the finding of the violation was set aside. Griffin versus Smithfield Foods, 183 F. Supp. 2d, the pinpoint cite is 827 to 28.

Do you want me to continue, Your Honor, or is that enough?

THE COURT: That's enough.

* * * *

[3136] MR. JORGENSEN: Let me just address the argument that's made in response to this instruction that rule of reason is not in the case. You have rules before, Your Honor, that rule of [3137] reason is in the case; and we would assert—

THE COURT: Rule of reason will be in the case.

MR. JORGENSEN: Okay.

THE COURT: And I think Mr. Whatley understands that, too.

MR. JORGENSEN: Okay.

THE COURT: He needs to protect his record. He needs to make these objections now or he waives them.

MR. JORGENSEN: Right.

THE COURT: It's very important that he assert any objection that he feels he has to me; because after I read these instructions, I will invite counsel up to ask you if you have any exceptions or objections that you haven't previously voiced, something brand new that I should know about before I submit the case to the jury. And you'll be given an opportunity to make a record on that.

MR. WHATLEY: And you won't expect us to remake the same objections.

THE COURT: No, no. I don't want you to repeat anything you've done here. You will have—that's the purpose of this conference and why it's on the record, in order that we don't spend a long time at side-bar going back through everything we're going back through this afternoon.

* * * *

FEB 3 - 2006

No. 05-864

IN THE

Supreme Court of the United States

HENRY LEE "LEROY" PICKETT, *et al.*,
Petitioners,

v.

TYSON FRESH MEATS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICI CURIAE R-CALF USA AND 36 CATTLE PRODUCER GROUPS IN SUPPORT OF PETITIONERS

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TABLE OF AUTHORITIES

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Cases

Alvarez v. IBP, Inc., 339 F.3d 894 (9th Cir. 2003); *aff'd, IBP, Inc. v. Alvarez*, 126 U.S. 514, 163 L. Ed. 2d 288 (2005). 5

Armour & Co. v. United States, 402 F.2d 712 (7th Cir. 1968)..... 14

Aspen Skiing Co. v. Aspen Highlands Skiing, 472 U.S. 585 (1985) 10

Bruhn's Freezer Meats of Chicago, Inc. v. U.S. Dep't of Agriculture, 438 F.2d 1332 (8th Cir. 1971). 9, 13

IBP, Inc. v. Glickman, 187 F.3d 974 (8th Cir. 1999). 13

London v. Fieldale Farms Corp., 410 F.3d 1295 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 752, 163 L. Ed. 2d 574 (2005). 12, 13, 14

Pickett v. Tyson Fresh Meats, Inc., 420 F.3d 1272 (11th Cir. 2005)..... 10, 11, 12, 13, 16

Pickett v. Tyson Fresh Meats, Inc., 315 F.Supp.2d 1172 (M.D. Ala. 2004) 10

Spencer Livestock Com'n Co. v. Dep't of Agriculture, 841 F.2d 1451 (9th Cir. 1988)..... 9, 12, 13

TABLE OF AUTHORITIES – Continued

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Cases – Continued

Stafford v. Wallace, 258 U.S. 495, 66 L. Ed. 735 (1922). 8, 15

Swift & Co. v. United States, 393 F.2d 247 (7th Cir. 1968). 9, 13, 14

Wilson & Co., Inc. v. Benson, 286 F.2d 891 (7th Cir. 1961) 9, 13

Statutes

Antidumping Act, 1921 (P.L. 67-10). 7

Packers and Stockyards Act, 1921, as amended, 7 U.S.C. § 181 *et seq.*

Section 202 (7 U.S.C. § 192) ..... passim

Title VII of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1673 *et seq.* 7

Legislative Materials

61 Cong. Rec. 1806, 1809 (May 26, 1921), 1863, 1887 (May 27, 1921), 1920 (May 31, 1921). 5, 17

H.R. Rep. No. 77, 67th Cong., 1st Sess. 2 (1921)..... 4

H.R. Rep. No. 85-1048, 85th Cong., 2nd Sess. (1958), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5213..... 6

TABLE OF AUTHORITIES – Continued

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Miscellaneous

J. MacDonald, et al., "Consolidation in U.S. Meatpacking," Agricultural Economic Report No. 785, Food and Rural Economics Division, Economic Research Service, U.S. Department of Agriculture (2000). 16

USDA Economic Research Service, "Beef Values and Price Spreads," available on-line at: http://www.ers.usda.gov/briefing/foodprice spreads/meatpricespreads/. 16

U.S. General Accounting Office, "Packers and Stockyards Programs: Actions Needed to Improve Investigations of Competitive Practices," GAO/RCED-00-242 (2000). 16

William E. Rosales, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and its Modern Awakening*, 2004 WIS. L. REV. 1497 (2004) 8

STATEMENT OF INTEREST OF *AMICI CURIAE*

Pursuant to Rule 37 of the Rules of this Court, and with the written consent of the parties reflected in letters lodged with the Clerk, the undersigned submits this *amici curiae* brief on behalf of the Ranchers-Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF USA) and the following 36 groups representing cattle producers:[1]

Beartooth Stock Association; Calaveras County Cattlemen's Association; Cattle Producers of Washington; Cherokee County Cattlemen's Association; Colorado Independent CattleGrowers Association; Crowley-Lincoln-Kiowa Cattlemen's Association; Dakota Resource Council; Dakota Rural Action; Independent Beef Association of North Dakota; Independent Cattlemen of Nebraska; Independent Cattlemen's Association of Texas, Inc.; Intertribal Agriculture Council; Kansas Cattlemen's Association; Kit Carson County Cattlemen's Association; Lincoln County Stockman's Association; Madera County Cattlemen's Association; McPherson County Farmers Union; Merced-Mariposa Cattlemen's Association; Mississippi Livestock Markets Association; Modoc County Cattlemen's Association; Montana Cattlemen's Association; Navajo County Cattlemen's Association; New Mexico Cattle Growers Association; North Central Montana Stockgrowers Association; Northern Wisconsin Beef Producers Association; Oregon Livestock Producer Association; Powder River Basin Resource Council; South

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[1] Pursuant to Rule 37.6, *amici curiae* state that no counsel for any party has authored this brief in whole or part, and no person or entity other than the *amici curiae*, its members or its counsel, made a monetary contribution to the preparation and submission of this brief.

Dakota Stock Growers Association; Southern Colorado Livestock Association; Southwestern Colorado Livestock Association; Spokane County Cattle Producers; Stevens County Cattlemen's Association; Washington Cattlemen's Association; Washington County Stockmen's Association; West Carroll Cattlemen's Association; and Women Involved in Farm Economics.

R-CALF USA is a non-profit association representing over 18,000 U.S. cattle producers in 47 states across the nation. R-CALF USA's membership consists primarily of cow-calf operators, cattle backgrounders, and feedlot owners. Various main street businesses are also associate members of the group. R-CALF USA's mission is to represent the U.S. cattle industry in trade and marketing issues to ensure the continued profitability and viability of independent U.S. cattle producers. R-CALF USA itself was not a party to the case below. However, the certified class includes some R-CALF USA members and a number of R-CALF USA members testified at the trial. The 36 groups joining R-CALF USA in this *amici* brief are non-profit associations representing the interests of independent cattle producers at the local, state, and tribal level.

Each of the *amici curiae* has a substantial interest in supporting the subject petition. The decision below threatens to undermine severely the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. § 181 *et seq.*, (PSA), a statute Congress intended to protect cattle producers such as those represented by *amici*.

SUMMARY OF THE ARGUMENT

At issue is whether the Eleventh Circuit erroneously construed the Packers and Stockyards Act of 1921, *supra*, and thereby undermined the statute's objectives, when it held that any business justification for a challenged commercial practice would negate an otherwise actionable claim.

Clear expressions of Congressional intent, the manifest scheme of the Act on its face, and certain judicial decisions indicate that the PSA is, *inter alia*, a remedial statute designed to address unfair business behavior, not just promote the efficiency objectives of antitrust laws. Yet, the Eleventn Circuit construed the Act to require that a plaintiff must demonstrate that a business practice is absolutely anti-competitive in order to establish a violation. This undermines the statute's objectives.

Further, the decision below conflicts with decisions of other Circuit Courts that have also construed the PSA. The Circuits disagree whether the Act is intended primarily to promote market efficiency or is a distinctive body of regulation tailored to the meatpacking industry to address its concentrated structure and its propensity to unfair behavior. This Court should resolve the conflict.

A resolution is particularly compelling given the PSA and the industry it regulates are national in scope and operation. Moreover, the industry has undergone major change in recent years, as the Eleventh Circuit observed, and this Court has never addressed the Act's application to the business practices in issue in this case.

ARGUMENT

I. THE COURT SHOULD REAFFIRM THE PURPOSES OF THE PSA AND THEREBY REVIVE ITS REMEDIAL OBJECTIVES, WHICH THE ELEVENTH CIRCUIT HAS UNDERMINED.

A. Congress intended the PSA to promote multiple social goals, not just market efficiency.

Congress enacted the PSA to regulate the meatpacking industry. The Act was designed not only to prohibit anti-competitive and monopolistic practices, but also to protect livestock producers from unfair, deceptive, and manipulative practices by the meatpackers to whom the producers must sell. Thus the Act goes far beyond traditional antitrust concerns of efficiency and market competition. This is evident in legislative history, the structure of the Act itself, and certain judicial decisions. The Eleventh Circuit ignored these realities by reading the Act restrictively to prohibit only acts and behavior having an absolutely anti-competitive impact. The appellate court thereby undermined the purposes of the PSA.

First, as to Congressional intent, the reports that accompanied the initial PSA do not describe the circumstances or evils that Congress sought to address in the Act.[2] One statement makes clear, however, that the elaborate regulatory scheme was designed to:

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[2] There was elaborate discussion of the Act's constitutionality and Supreme Court cases on the Commerce Clause. *See generally* H.R. Rep. No. 77, 67th Cong., 1st Sess. 2 (1921). There was concern in 1921 whether Congress could so extensively regulate commerce.

> safeguard the interest of the public and *all* elements of the industry from the producer to the consumer without destroying *any* unit of it. [Emphasis added.]

H.R. Rep. No. 77, 67th Cong., 1st Sess. 2 (1921). Thus, protecting "unit[s]" was an objective.

Statements of individual Congressmen, however, filled the gap the reports left open. For example, Congressman Voigt alluded to the then-existing "Big Five" meatpackers (Swift & Co., Armour & Co., Morris & Co., Wilson & Co., and Cudahy Packing Co.) and saw the Act as necessary to confront the industry's "concentration." 61 Cong. Rec. 1863 (May 27, 1921). Congressman Tincher stated as follows: "Time has demonstrated that the business of producing meat in this country can not be carried on under existing conditions."[3] *Id.* at 1809 (May 26, 1921). Congressman Rayburn characterized the Act as giving the Secretary of Agriculture wider power than that of the Federal Trade Commission. *Id.* at 1806. These statements, it must be recalled, were made when the Sherman Act was already law.

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[3] Upton Sinclair portrayed these "conditions" in his classic 1906 novel, *The Jungle*. The book presents the packing industry, at the turn of the twentieth century, as characterized by predatory greed, where a handful of powerful packers exploited workers and dealt unfairly in multiple forms of business activity. It is widely recognized that Sinclair's novel played a role in prompting reform and extensive regulation of the industry. *See, e.g., Alvarez v. IBP, Inc.*, 339 F.3d 894, 897-98 (9th Cir. 2003) ("From the time that publication of Upton Sinclair's *The Jungle* provoked *** passage of the Meat Inspection Act of 1906, the meat packing industry has been one of the most regulated businesses in the United States."), *aff'd IBP, Inc. v. Alvarez*, 126 U.S. 514, 163 L. Ed. 2d 288 (2005).

Congress more directly discussed the Act's purposes in amendments in 1958. The House Report then stated as follows:

> The Packers and Stockyards Act was enacted by Congress in 1921. The primary purpose of this Act is to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry. *The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock* and to protect consumers against unfair business practices in the marketing of meats, poultry, etc. Protection is also provided to members of the livestock marketing and meat industries from unfair, deceptive, unjustly discriminatory, and monopolistic practices of competitors, large or small. [Emphasis added.]
>
> * * * * *
>
> The Act provides that meatpackers subject to its provisions shall not engage in practices that restrain commerce or create monopoly. *They are prohibited from buying or selling any article for the purpose of or with the effect of manipulating or controlling prices in commerce.* [Emphasis added.]

H.R. Rep. No. 85-1048, 85th Cong., 2nd Sess. (1958), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5213. The Report further clarifies that the PSA served objectives *in addition* to those embodied in the Sherman and the Clayton Acts. *Id.* at 1517. These further purposes were to address the problems Congress confronted in 1921.

The text of the Act itself further reflects its multiple concerns. First, on its face, it sets forth a detailed list of business practices that Congress wished to proscribe, and the provisions address many concerns other than maximizing market efficiency.[4] Second, like other "fair trade" statutes, the Act sought to protect *certain actors* ("units"),[5] particularly small cattle producers, who had to sell their livestock in a market dominated by powerful

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[4] The statute provides:

> It shall be unlawful for any packer *** to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> * * * * *
>
> (e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices ***.

7 U.S.C. § 192. Note these prohibitions are stated as absolute bans, unlike the prohibition in § 192(c), which bars supply apportionment "if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly." No such limitation is present on the face of the statute regarding subsections (a) and (e). The decision below has the effect of inserting the limitation which Congress only chose to include in subsection (c) into all other parts of the section.

[5] *E.g.*, the U.S. antidumping law, currently in Title VII of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1673 *et seq.* This unfair-trade-practice statute provides relief for U.S. industries injured by *unfair* import pricing (*i.e.*, the pricing of imports below their "normal value"), such that the statute protects a class of *competitors*, not pure competition itself as might be the case of an antitrust law. Significantly, the original antidumping law was the Antidumping Act, 1921 (P.L. 67-10), which Congress enacted on May 27, 1921, less than three months before enacting the PSA on August 15, 1921.

buyers. *See* the discussion of legislative history *supra*; *see also, e.g.*, William E. Rosales, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and its Modern Awakening*, 2004 WIS. L. REV. 1497 (2004) (a scholarly history of the PSA). Thus, the Act promoted *social goals*, not only market efficiency.

Finally, several courts have recognized that the PSA's objectives extend beyond promoting market efficiency. In its first review of the Act, for example, this Court explained that the PSA sought not only to promote competition but also to protect the interests of small producers, stating:

> [The Act] forbids [packers] to engage in unfair, discriminatory, or deceptive practices in such commerce, or to subject any person to unreasonable prejudice therein, or to do any of a number of acts to control prices or establish a monopoly ....

Stafford v. Wallace, 258 U.S. 495, 513, 66 L. Ed. 735, 740 (1922). While noting the "chief evil" Congress sought to address through the Act was "the monopoly of the packers, enabling them unduly and arbitrarily to lower prices," the Court also noted "[a]nother evil" targeted by Congress. 258 U.S. at 514–15, 66 L. Ed. at 741. The other evil was unfair trade practices such as "exorbitant charges, duplication of commissions, [and] deceptive practices in respect to prices ...." *Id.* The Court explained that the imbalances in power between the packers and stockyards, on the one hand, and the owners and sellers of livestock, on the other, "create a situation full of opportunity and temptation, to the prejudice of the absent shipper and owner [of the livestock]." *Id.*

Other courts have echoed this reading. The Ninth Circuit found the PSA "was not intended merely to pre-

vent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics." *Spencer Livestock Com'n Co. v. Dep't of Agriculture*, 841 F.2d 1451, 1455 (9th Cir. 1988). The Seventh Circuit saw the Act was designed to go beyond existing anti-trust statutes in effect at the time of its enactment, stating "the Act does not specify that a 'competitive injury' or a 'lessening of competition' or a 'tendency to monopoly' be proved in order to show a violation of the statutory language." *Wilson & Co., Inc. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961). That Court subsequently affirmed this understanding, stating further, "The Act is remedial legislation and is to be construed liberally in accord with its purpose to prevent economic harm to producers and consumers at the expense of middlemen." *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968). The Eighth Circuit has agreed: "... the purpose of the Act is to assure fair trade practices in the livestock marketing and meat-packing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock ...." *Bruhn's Freezer Meats of Chicago, Inc. v. U.S. Dep't of Agriculture*, 438 F.2d 1332, 1337 (8th Cir. 1971).

B. The Eleventh Circuit disregarded the PSA's important remedial objectives.

The Eleventh Circuit construed the PSA as a measure to promote maximum competition to the exclusion of other objectives. Thus, the defendant, Tyson Fresh Meats, the nation's largest meatpacker, was able to offer several self-serving reasons for its long-term marketing agreements, each of which assertedly served a valid business purpose and competitive objective. The Eleventh Circuit stated:

> If there is evidence from w[illegible]ch a jury reasonably could find that none of Tyson's as-

> serted justifications are real, that each one is pretextual, Pickett [the cattle producer] wins. Otherwise, Tyson wins.

Pickett v. Tyson Fresh Meats, Inc., 420 F.3d 1272, 1281 (11th Cir. 2005); Pet. App. at 14a. Put differently, any valid business justification[6] for the marketing agreements in issue would defeat Pickett's PSA relief, regardless of whether a less harmful or restrictive means of accomplishing the alleged justification might exist or could be found.[7] Under this framework, it was immaterial that the jury found (a) that Pickett's cattle were higher quality than the cattle from Tyson's captive source, yet (b) because of the long-term marketing agreements Pickett received a lower price. *Pickett*, 420 F.3d at 1276; Pet. App. at 24a. The Court found as a matter of law that this would not be probative of unfair or manipulative behavior proscribed by the PSA.

This Court should reaffirm the PSA's original objectives as described in subpart I-A, above. And it is criti-

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[6] The Circuit Court used the term "pro-competitive justifications," (*Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1279 (11th Cir. 2005); Pet. App. at 11a), while the District Court used the term, "business justifications" (*Pickett v. Tyson Fresh Meats, Inc.*, 315 F.Supp.2d 1172, 1175 (M.D.Ala. 2004)). Here we use the District Court's terminology.

[7] In contrast to the Eleventh Circuit's approach here, this Court has stated, in an antitrust context, that, in considering whether business conduct is impermissible, "it is relevant to consider its impact on consumers and *whether it has impaired competition in an unnecessarily restrictive way*." *Aspen Skiing Co. v. Aspen Highlands Skiing*, 472 U.S. 585, 605 (1985) (emphasis added). Here, the lower Court did not consider whether Tyson's challenged marketing arrangements were the least anticompetitive method of achieving their allegedly legitimate business objectives.

cal that it do so now. As the Eleventh Circuit observed, industry practices have undergone changes in the "last decade or so" (*Pickett*, 420 F.3d at 1275; Pet. App. at 4a). These changes place small cattle producers (including many *amici* members) at the mercy of very large packers. As the Eleventh Circuit explained, before the advent of the long-term agreements, "packers purchased cattle almost exclusively through the cash market," *id.*, but now they utilize captive sources and effectively manipulate market prices to the injury of small producers, as the jury found below. Therefore, unless this Court re-affirms the PSA's true objectives, the industry may revert to the pattern existing in 1921 when Congress enacted the PSA.

II. IN ANY CASE, THIS COURT SHOULD RESOLVE A SPLIT IN THE CIRCUITS AND CLARIFY THE STANDARD FOR PSA VIOLATIONS.

The Eleventh Circuit's decision to require a showing of absolute anti-competitive impact to establish a PSA violation conflicts not only with the remedial purpose of the Act, as described in subpart I-A, above, but also with specific interpretations other Circuits have given the Act. Indeed, the Eleventh Circuit, itself, noted this split, *see below*.

The Eleventh Circuit ruled below that a plaintiff must show that a defendant's conduct was absolutely anti-competitive to establish a PSA violation. Thus, any business justification for challenged business behavior would constitute a "saving grace" and defeat a plaintiff's claim for relief. Thus, the Eleventh Circuit held that the Act "requires a plaintiff to show an adverse effect on competition," with regard to both unfair practice claims under section 202(a) of the Act (7 U.S.C. § 192(a)) and price manipulation claims under section 202(e) of the Act (7 U.S.C. § 192(e)). *Pickett*, 420 F.3d at 1280; Pet. App. at

12a. The Court cited its earlier holding in *London v. Fieldale, infra,* with regard to unfair practice claims to support this conclusion. *Id.*

London is particularly important for purposes of the petition in the instant case. There, the Eleventh Circuit itself acknowledged that its decision to require a showing of anti-competitive impact was a matter of some dispute among the Circuits. *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 752, 163 L. Ed. 2d 574 (2005). For example, the *London* Court noted its disagreement with the Ninth Circuit (*id.*), which gave the Act a far different construction in *Spencer Livestock Com'n Co. v. Dep't of Agriculture*, 841 F.2d 1451 (9th Cir. 1988). In *Spencer*, the Court characterized the position of the petitioners therein as one in which the PSA was "nothing more than a mirror of the antitrust laws." 841 F.2d at 1455. The Court categorically rejected the position, stating:

> This argument relies on an incomplete understanding of the objectives of the Act [*i.e.*, PSA]. The primary purpose of the Act was "to assure fair competition and *fair trade practices* in livestock marketing...." H.R.Rep. No. 1048, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Admin. News 5212, 5213 ([Court's] emphasis added). It was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics.

Id. *Spencer* therefore ruled as follows:

> {W]e uphold a finding of a § 213 violation where the evidence establishes a deceptive

> practice, *whether or not it harmed consumers or competitors.* [Emphasis added.]

Id. The subject of *Spencer* was section 213 of the PSA proscribing deceptive practices. However, the Ninth Circuit's rationale (based on the purposes of the PSA as reflected in legislative history) logically applies as well to section 202 provisions proscribing unfair practices and price manipulation, the PSA provisions at issue in this case.

The *London* Court cited other Circuits in support of its conclusion. *London*, 410 F.3d at 1303. However, these other Courts have not been uniform in their interpretations of the Act, and none have applied the *Pickett* rule that any business justification can defeat a PSA claim, including a price manipulation claim under section 202(e).

Thus, the Eighth Circuit relied on a claimant's failure to show competitive injury when it found no violation of section 202(a) of the PSA in *IBP, Inc. v. Glickman*, 187 F.3d 974 (8th Cir. 1999). But, in that case, all parties agreed there was no lowering of prices to producers nor was price manipulation alleged under section 202(e), a difference not addressed in *Pickett*. This difference is particularly significant given the Eighth Circuit's previous recognition that the PSA was designed "to safeguard farmers and ranchers against receiving less than the true market value of their livestock." *Bruhn's Freezer Meats*, 438 F.2d at 1337.

The Seventh Circuit, also cited as supportive in *London* (410 F.3d at 1303), has additionally issued interpretations varying somewhat from the Eleventh Circuit's. Pointing to the PSA's legislative history and to its own previous decisions, the Seventh Circuit said: "Section 202(a) of the Act does not require the Government to

prove injury to competition." *Swift*, 393 F.2d at 253, citing *Wilson*.

The Eleventh Circuit particularly relied on *Armour & Co. v. United States*, 402 F.2d 712 (7th Cir. 1968), to support its position that all section 202(a) violations require a showing of anti-competitive impact. *See London*, 410 F.3d at 1303. However, the Seventh Circuit handed down *Armour* just six months after *Swift*, discussed above, and *Armour* observed: "[w]hile Section 202(a) of the Packers and Stockyards Act may be broader than antecedent antitrust legislation," it does not allow:

> ... condemning practices which are neither deceptive nor injurious to competition nor intended to be so .... Even if predatory intent is absent, Armour's coupon program might violate Section 202(a) if it would probably result in competitive injury, tend to restrain trade or create a monopoly.

Armour, 402 F.2d at 722. The Eleventh Circuit relies on *Armour* without accounting for the *Armour* Court's careful statements that a practice may violate the PSA if it is either injurious to competition or deceptive, and if there is either competitive injury or a restraint to trade.

Thus, the Eleventh Circuit's holding here lies at the outer edge of the varying interpretations offered by the various Circuits construing the PSA. While some Circuits find the PSA prohibits unfair, deceptive, and manipulative practices regardless of anti-competitive effect, others state the Act only prohibits those practices which can be shown to injure competition. The Eleventh Circuit appears to go further still by requiring the anti-competitive effect to be absolute, with no business justifications.

The law should be clear for all. It should put packers on notice as to the threshold of potential liability and it should clarify for cattle producers when they can obtain relief. The resolution of this conflict is central to the scope and effectiveness of the Act. Claims under the PSA should succeed or fail based on their merits under the law as intended by Congress, not based on the court in which they happen to be heard. Accordingly, this Court should review the instant case to clarify the PSA's meaning.

III. THE NATIONAL SCOPE OF THE INDUSTRY UNDERSCORES THE IMPORTANCE OF REVIEWING THIS CASE.

Conflict among the Circuits regarding the PSA's meaning is particularly harmful in this case, where fulfillment of the Act's remedial objectives depends on clear national standards. The livestock and meatpacking industry is national in scope, as are the instant *amici*. At the same time, the PSA was specifically designed to provide for nation-wide regulation. This Court stated in *Stafford*:

> The act ... treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulation.

258 U.S. at 516, 66 L. Ed. at 741. In fact, today, hundreds of thousands of small, independent cattle producers all across the country, including those who are members of *amici*, sell to an industry increasingly concentrated in

the hands of four large packing companies.[8] This concentration among packers approaches and may even exceed the level of concentration in 1921. Indeed, the four largest beef packing companies control more than 80 percent of steer and heifer slaughter.[9] Contracting practices employed by those packers affect cattle producers from Washington State to Florida. Courts should apply the law to these practices with consistency and predictability.

In addition to being national in scope, this case is also of national importance. The defendant, Tyson Fresh Meats, processes up to forty percent of the beef products sold nationwide. *See Pickett,* 420 F.3d at 1274; Pet. App. at 1a–2a. Tyson also plays a dominant role in the cattle slaughter market, purchasing 10 million of the 25 million cattle slaughtered each year. *See Pickett,* 420 F.3d at 1276-77; Pet. App. at 6a. The contract practices now in issue were used in twenty to fifty percent of all of Tyson's cattle purchases between 1994 and 2002. *See Pickett,* 420 F.3d at 1276 fn.1; Pet. App. at 4a, fn. 1. Moreover, this form of contracting developed relatively recently, and its use in the industry grew rapidly over the 1980s and 1990s. *See Pickett,* 420 F.3d at 1275-76; Pet. App. at 4a. During the same period, packer concentration has increased and the cattle producers' share of each retail dollar for beef has fallen.[10]

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[8] *See, e.g.*, J. MacDonald, et al., "Consolidation in U.S. Meatpacking," Agricultural Economic Report No. 785, Food and Rural Economics Division, Economic Research Service, U.S. Department of Agriculture (2000).

[9] U.S. General Accounting Office, "Packers and Stockyards Programs: Actions Needed to Improve Investigations of Competitive Practices," GAO/RCED-00-242 (2000) at 31.

[10] The rancher's share of each retail dollar earned on beef was 45 cents in 2004, down from 56 cents in 1993. USDA Economic Research Service, "Beef Values and Price Spreads,"

This Court has never addressed these new business practices, and thus the issue presented is one of first impression for this Court. In drafting the PSA, Congress recogni[illegible] the need for the Act to be open to judicial interpret[illegible] so that future practices by powerful packers could be scrutinized and remedied if necessary.[11] Ironically, this very openness is now being used to undermine the purposes for which the Act was enacted. The Eleventh Circuit has given a narrow construction to the Act's intentionally flexible terms and curtailed the relief the Act can provide.

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available on-line at: http://www.ers.usda.gov/briefing/foodpricespreads/meatpricespreads/.

[11] Congressman Anderson observed during the House debates on the PSA:

> Industry is progressive. The methods of industry and of manufacture and distribution change from day to day, and no positive iron-clad rule of law can be written upon the statute books which will keep pace with the progress of the industry. So we have not sought to write into this bill arbitrary and iron-clad rules of law. We have rather chosen to lay down certain more or less definite rules, rules which are sufficiently flexible to enable the administrative authority to keep pace with the changes of methods in distribution and manufacture and in industry in the country.
>
> * * * * *
>
> As I said the other day, business is progressive, and there must be a certain amount of flexibility in the prohibitions in order that the prohibitions may keep up with the progress of industry.

61 Cong. Rec. 1887 (May 27, 1921), 1920 (May 31, 1921).

Accordingly, this Court should reaffirm the PSA's founding objectives and provide guidance to the lower courts on how to interpret the Act consistently on a nation-wide basis. Otherwise, the gross imbalances in bargaining power and abuses of that power that prompted the enactment of the PSA in 1921 may re-emerge with no remedy available to those very cattle producers whose interests the PSA was designed to protect.

CONCLUSION

This case presents important issues arising under a federal statute that impacts the nation as a whole. It also represents an issue on which the Circuit Courts disagree. Accordingly, for all of the reasons set forth above, this Court should grant a *writ of certiorari*.

Respectfully submitted,

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